To: Dunham, Sarah[Dunham.Sarah@epa.gov]
From: Lewis, Josh
Sent: Wed 5/24/2017 4:14:11 PM
Subject: Fwd: Meeting on TX Issues

here's the email from kristi I referenced at RT this am

Begin forwarded message:

From: "Smith, Kristi" <Smith.Kristi@epa.gov>
Date: May 22, 2017 at 3:24:02 PM EDT
To: "Lewis, Josh" <Lewis.Josh@epa.gov>
Subject: Meeting on TX Issues

Josh -

Per the message below, we were discussed Texas issues with Justin Schwab today. He would like to make sure we get a meeting on the calendar early next week to have an HQ discussion about the process and potential options for going forward with the big picture discussion with Texas (and potentially TX EGUs). Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Do you have the information you need to put together such a briefing or do you more info from OGC, OAQPS, and CAMD?

- Kristi

Kristi M. Smith * Asst. General Counsel * US EPA, Office of General Counsel
* smith.kristi@epa.gov * (202) 564-3068*

Sent from my iPhone

On May 18, 2017, at 8:48 AM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

Let's go ahead and set up an HQ meeting. Sarah, can you/OAR take the lead on setting up logistics?

Sam, can you confirm with the state the scope of the meeting –should we plan to discuss all of their issues or only a certain portion of the issues (if so, which ones).

From: Coleman, Sam
Sent: Thursday, May 11, 2017 3:25 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>
Subject: Re: Texas Issues

Thanks

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

On May 11, 2017, at 2:08 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

> That all sounds good. Lorie, please inform DOJ.

I think we can do a meeting in the near future at HQ as well.

Sent from my iPhone

On May 11, 2017, at 3:06 PM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:

> Just got off the phone with TCEQ. They are all in favor of holding the Ozone Transport issue in abeyance.
>
> They are working on a path forward for a variety of issues not exclusive to Ozone and would like a meeting with HQ in the near future.
>
> Samuel Coleman, P. E.,
>
> Deputy Regional Administrator
>
> 214.665.2100 Ofc
>
> 214.665. 3110 Desk
>
> 214.665.2016 Cell
>
> Coleman.sam@epa.gov
>
> Sent from my iPhone
>
> On May 10, 2017, at 5:10 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:
>
> > Sam
> >
> > Any news from TCEQ? Ex. 5 - Attorney Work Product, Attorney Client
> > **Ex. 5 - Attorney Work Product, Attorney Client**
> >
> > Thanks

Lorie

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Coleman, Sam
Sent: Monday, May 08, 2017 5:53 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: RE: Texas Issues

OK

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Schmidt, Lorie
Sent: Monday, May 08, 2017 4:28 PM
To: Coleman, Sam <Coleman.Sam@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Re: Texas Issues

Thanks, Sam.

Once you hear from the commissioners, please let OGC know. Assuming they agree with the Executive Director, we will then contact DOJ so that we can seek Texas' agreement to request that the litigation be held in abeyance.

Lorie

On May 8, 2017, at 11:43 AM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:

Thanks. There is a filing deadline on 2008 Ozone Transport SIP litigation imposed by DOJ of this Friday (12 May). As this relates to TX, I recommend that we seek an abeyance will allow these discussions to take place. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Gunasekara, Mandy
Sent: Thursday, May 04, 2017 12:31 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Coleman, Sam <Coleman.Sam@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Re: Texas Issues

Yes- let's do it

Sent from my iPhone

On May 4, 2017, at 12:53 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

> For my part this sounds worth considering; I will be interested in hearing other people's views, however.
>
> Sent from my iPhone
>
> On May 4, 2017, at 11:13 AM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:
>
> Last summer EPA, TCEQ and the EGU owners in TX met to attempt global settlement on Haze and on a couple of related issues **Ex. 5 - Deliberative Process**

Ex. 5 - Deliberative Process

Given the current situation, I was wondering if EPA might be interested in having a thoughtful and organized discussion with the state, and the EGUs. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Is EPA interested in convening such a meeting? If so, I would like to schedule a call to discuss format and logistics. Please let me know.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Page, Steve[Page.Steve@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Koerber, Mike[Koerber.Mike@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]
From: Dunham, Sarah
Sent: Thur 5/11/2017 5:11:38 PM
Subject: FW: Texas case table
2017 TX EGU cases 05 11 3017 pdf.pdf
ATT00001.htm

fyi

From: Coleman, Sam
Sent: Thursday, May 11, 2017 1:09 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Fwd: Texas case table

Thanks to OGC and my R6 team, Attached is the collaborative effort to capture the essence of the litigation ongoing regarding EGUs and the State of TX. As you can see there is overlap is a number of areas with respect to pollutants and facilities. Additionally, everything is NOT on a coordinated schedule.

Further briefing and discussion is likely appropriate. Let me know if there are questions.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

Begin forwarded message:

From: "Payne, James" <payne.james@epa.gov>
Date: May 11, 2017 at 11:45:58 AM CDT
To: "Schoellkopf, Lynde" <Schoellkopf.Lynde@epa.gov>, "Coleman, Sam" <Coleman.Sam@epa.gov>, "Stenger, Wren" <stenger.wren@epa.gov>, "Donaldson, Guy" <Donaldson.Guy@epa.gov>
Cc: "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: Texas case table

Lynde - thanks to you and team.

Sam and all - this version of the table can be share with Texas or others. The "Potential Pathways" column is removed and the rest of the table has been edited so it can be shared outside the agency.

Jim

Sent from my iPhone

Begin forwarded message:

From: "Schoellkopf, Lynde" <Schoellkopf.Lynde@epa.gov>
To: "Payne, James" <payne.james@epa.gov>, "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: revised litigation table

Jim,

Kristi Smith provided 3 minor comments that I've incorporated into the revised attachment. We should be okay to circulate this as needed. Suzanne mentioned that Kristi plans to set up meetings with OAR in the future to discuss all of this. Thanks!

Lynde J. Schoellkopf

U.S. EPA

Office of Regional Counsel

1445 Ross Ave.

Dallas, TX 75202

Cases related to Texas EGUs

Texas Cases

Action	Status	Comments/Overlap with other cases:	Pollutants
TX Regional Haze BART FIP (*NPCA et al. v. Jackson*, 1: 11-cv-01548 (D.D.C.)) and FIP for Interstate Visibility Transport (*Sierra Club v. McCarthy*, Case No. 4:14-cv-05091-YGR and Case No. 4:14-cv-3198-YGR (consolidated) (N.D. C.A.))	Two CD deadlines to take final action by 9/9/17 to address EGU BART under Regional Haze and interstate visibility transport (i.e., "prong 4") for the 1997 O3 NAAQS and 1997 PM2.5 NAAQS.	Case involves (1) the BART requirements under CAA 169A for EGUs; and (2) whether TX's SIP has the requisite measures to prevent interference with other states visibility protection programs under CAA 110(a)(2)(D)(i)(II).	SO_2, NOx, PM for BART. Impacts on visibility are predominantly from SO2
TX Regional Haze (*Texas v. EPA*, Case No. 16-60118 (5th Cir.)) (Texas filed petitions in the D.C. Circuit that they describe as "protective," litigation and those are in abeyance)	Remanded without vacatur on 3/22/2017.	Entire rulemaking is under judicial stay. Remanded FIP included SO2 control requirements for large EGUs in TX. Remanded SIP disapprovals require new action; Prior partial approvals, though subject to judicial stay, are not part of remand burdens.	SO_2 (for haze)
Interstate Transport SIP	Merits brief due May 31st. Luminant an intervenor.	Texas, TCEQ sued EPA over our final action disapproving the State's December 13, 2012, interstate transport SIP addressing the 2008	2008 Ozone NAAQS (NOx, VOC precursors)

Action	Status	Comments/Overlap with other cases:	Pollutants
(*Texas v. EPA* Case No. 16-60670 (5th Cir.))		ozone NAAQS (81 Fed. Reg. 53,284 (Aug. 12, 2016)). Luminant and related entities intervened on behalf of the petitioners. Our SIP disapproval obligated EPA to promulgate a FIP and we partially addressed this obligation in the 2016 CSAPR Update. Case connected to TX RH discussions and CSAPR Update.	
Interstate Transport FIP (*Sierra Club v. Pruitt*, Case No. 1:00-cv-01541-CKK (D.D.C.))	Pending claim regarding EPA's obligation to promulgate a FIP addressing interstate transport for Texas for the 1997 PM2.5 NAAQS. Status Report due July 24, 2017.	EPA promulgated a FIP addressing the 1997 PM2.5 NAAQS for Texas in the 2011 CSAPR rulemaking. EPA moved to have the claim dismissed based on its promulgation of the FIP in CSAPR, but the D.C. Circuit subsequently remanded the state's annual SO2 budget in 2015. The court therefore denied the motion and ordered EPA to file status reports every 90 days documenting progress on addressing the D.C. Circuit's remand.	1997 PM2.5 NAAQS (NOx and SO2 precursors)

National Rules/Cases

Action	Status	Comments/Overlap with other cases	Pollutants
CSPAR Update (*Wisconsin v. EPA*, Case No. 16-1406	Final Rule issued October 2016. Numerous parties, including Texas & TCEQ, filed	The CSAPR Update quantified and addressed (through an ozone-season NOx allowance trading program) part of states' (including	1997 and 2008 Ozone NAAQS (NOx precursor)

Action	Status	Comments/Overlap with other cases	Pollutants
(and consolidated cases) (D.C. Cir.))	challenges in the D.C. Circuit. Pending briefing schedule from the court.	Texas's) ozone-season NO_X emission reduction obligation pursuant to the good neighbor provision for the 2008 ozone NAAQS, but did not address the full emission reduction obligation. The Rule imposed FIPs to achieve the necessary emissions reductions in time to assist downwind states with meeting NAAQS attainment deadlines. The authority for issuing a FIP for Texas stems from EPA's disapproval of the state's SIP, which is being challenged separately in the 5th Circuit. The Rule also addressed the remand of prior CSAPR budgets promulgated in 2011 addressing the 1997 ozone NAAQS, including the remand of Texas's ozone-season NOx budget.	
CSAPR Better Than BART (*Utility Air Regulatory Group v. EPA,* No. 12-1342 (and consolidated cases) (D.C. Circuit)	Case is fully briefed, but oral argument has not been scheduled.	In this rule, EPA determined that CSAPR would provide for greater reasonable progress than BART. EPA also issued limited disapprovals of a number of SIPs (including that of Texas) based on their reliance on CAIR to meet regional haze requirements and issued FIPs pointing to CSAPR to address issue. Texas, Louisiana, UARG, and Luminant challenged our limited disapprovals of SIPs for reliance on CAIR.	SO_2, NOx
Regional Haze Rule Update D.C. Circuit	Final Rule issued in January 2017. Four states, including Texas, several industry groups, Chamber of Commerce, and	EPA promulgated revisions to the 1999 Regional Haze Rule to clarify the relationship between long-term strategies and reasonable progress goals and states'	PM 10, PM 2.5, NOx, SO2, VOC's (for haze)

Action	Status	Comments/Overlap with other cases	Pollutants
	conservation organizations filed petitions for review. Motions to govern are currently due May 25, 2017.	associated regulatory obligations for determining reasonable progress for the second and subsequent planning periods. The RHR revisions also modified requirements related to, among other things, periodic regional haze progress reports, interstate consultation, and reasonably attributable visibility impairment, and included a one-time extension of the deadline for submission of the next periodic regional haze SIP revision from July 31, 2018, to July 31, 2021.	
SO_2 Designations D.C. Circuit (*Samuel Masias v. EPA*, No. 16-1314 [consolidated with 16-1318, 16-1384, 16-1424, 17-1053, 17-1055) /5th Circuit (*Texas v. EPA*, No. 17-60088)/7th Circuit (Southern Illinois Power Cooperative v. EPA, No. 16-3398)	Texas and Luminant timely filed petitions for review in the D.C. and 5th Circuits of the December 2016 supplemental designations. Texas and Luminant also filed administrative petitions with EPA for those same designations.	On December 13, 2016, EPA designated three areas as nonattainment and one area as unclassifiable in Texas for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard, which supplemented the July 12, 2016 designations of 61 other areas in 24 states (collectively "Round 2"). Within the designations challenged by Texas, there is a Luminant EGU located in each of the four areas. In addition to the lawsuits filed in the 5th and D.C. Circuits, Texas and Luminant have also filed administrative petitions with EPA.	SO_2 (2010 primary NAAQS)

Region 6 Louisiana and Arkansas Cases:

Action	Status	Comments/Overlap with other cases	Pollutants
LA Regional Haze BART Action *Sierra Club v. Pruitt*, Case No. 15-cv-O 1555 (D.D.C.).	CD deadline to approve a SIP or issue a FIP Proposal 06/29/17 Final 12/15/17.	We cannot finalize our proposed approval of the portion of the LA RH action addressing EGU BART for NOx until EPA finalizes the national rule proposal that CSAPR continues to be better than BART.	SO2, NOx, PM (for haze)
Arkansas Regional Haze *Arkansas v. EPA* (Case No. 16-4270 (and consolidated cases)) (8 Cir.)	Status Report on negotiations due to Court on 6/9/17. Court put the litigation schedule in abeyance for 90 days to facilitate settlement negotiations. EPA response to stay motions and merit briefs still pending.	On 04-17-17, EPA granted reconsideration of certain requirements in the FIP addressing regional haze/interstate visibility transport requirements. The effectiveness of the FIP requirements that are under reconsideration related to limits for NOx (White Bluff, Flint Creek, and Independence) and SO2 (White Bluff and Independence) were stayed for 90 days. 81 FR 66332 (September 27, 2016). EPA will need to undertake additional rulemaking to extend the compliance dates by an additional 90 days to reflect the 90 day stay of the effectiveness date.	SO_2, NOx, PM (for haze)

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 15, 2017

Honorable Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, MC 1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

via regulations.gov

Re: Docket ID No. EPA-HQ-OA-2017-0190, Comments from Texas concerning stay of imminent regulatory deadlines for existing regulations currently subject to litigation and abatement of such litigation pending review of each rule.

Dear Administrator Pruitt;

We write in response to the Environmental Protection Agency's (EPA's) request for comment concerning the agency's internal review and evaluation of existing regulations. *See* 82 Fed. Reg. 17,793 (Apr. 13, 2017). We ask that the EPA Regulatory Reform Task Force consider these comments regarding EPA regulations currently subject to judicial review. The goals stated in Executive Order 13777, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), if achieved, will help return our country to an era of less burdensome federal regulation and greater cooperation between the federal government and states in environmental regulation.

Cooperative Federalism Principles are Embodied in Environmental Law.

Cooperative federalism is an important principle in our country. This is because "the role of the States as laboratories for devising solutions to difficult legal problems" is long recognized. *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *see United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). To this point, we recognize that deference to the States "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Therefore, when it comes to relations between the States and the federal government, the Supreme Court has admonished the importance of seeking the appropriate "federal balance." *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 132 S. Ct. 2566, 2659 (2012). The power to spend money, for example, "without concern for the federal balance, has the potential to obliterate

distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *NFIB*, 132 S. Ct. at 2659. The same is true when the federal government exercises its regulatory power. For only if the States are able to experiment, so that we may learn lessons from our collective experiences, will the depth and breadth of the potential of our Union be fulfilled. [1]

Litigation and Regulation Enforcement Should be Suspended Pending Agency Reconsideration.

Unfortunately, as you are aware, the previous administration was unwilling to engage with most states, and took actions or issued rules ignoring the spirit of cooperative federalism embodied in the Clean Air Act and Clean Water Act. *See* 42 U.S.C. § 7401(a)(3), 33 U.S.C. § 1251(b). As a result, Texas and others, along with industry representatives, were routinely forced to seek judicial review of many of the EPA's actions. Enclosed at Attachment 2 is a list of pending actions in which Texas is still involved.

The issue statements and briefs filed in the list of pending actions articulate why each of the challenged rules or actions are arbitrary and capricious, not in accordance with the law, are unnecessary or ineffective, impose costs that exceed benefits, and otherwise create serious inconsistency with the initiatives described in Executive Order 13777. Enclosed at Attachments 3A and 3B are the petitions for review and statement of issues filed by Texas in each of the matters.[2] For the reasons discussed in the filings concerning each of the rules listed in Attachment 1, we request that each of those rulemakings be reconsidered and that any imminent regulatory deadlines be suspended pending your Agency's reconsideration.

Furthermore, although the Department of Justice has sought to abate many matters in litigation while the EPA revaluates each rule,[3] several matters identified in Attachment 1 are not abated, including the Cross State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016); *Texas v. EPA*, 16-1428; consolidated with *Wisconsin v. EPA*, 16-1406 (D.C. Cir.), and Air Quality Designations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard, 81 Fed. Reg. 89,870 (Dec. 13, 2016); *Texas v. EPA*, 17-60088 (5th Cir.); *Texas v. EPA*, 17-1053, consolidated with *Masias (Sierra Club) v. EPA*, 16-1314 (D.C. Cir.).

---

[1] This is the subject of a more comprehensive letter Texas and 18 other states previously addressed. Letter from Hon. Ken Paxton to Hon. Scott Pruitt, Mar. 7, 2017, at https://www.texasattorneygeneral.gov/files/epress/FINAL_Signed_Letter_to_EPA.pdf (also enclosed at Attachment 1).

[2] Because the Court of Appeals for the Fifth Circuit does not mandate the filing of issue statements, those issue statements are not included. Due to the voluminous nature of filed briefs, we refer the agency to the briefs in such cases rather than include them here.

[3] The abatement of litigation is consistent with Executive Order 13783, Promoting Energy Independence and Economic Growth (Mar. 28, 2017), and Executive Order 13777.

Each of these matters have looming briefing or motion deadlines. Rather than have Texas and other petitioners continue to incur legal expenses and costs to challenge regulations that should be reevaluated, EPA should direct the Department of Justice to abate these matters pending further review of each rule. Any imminent deadlines imposed by those rules should be suspended during agency review.

Abatement of the litigation will allow the EPA time to consider each rule, especially for those rules that form part of a larger, comprehensive framework of unnecessary, overlapping, and duplicative regulation promulgated by the prior administration targeting the same pollutants, goals, and programs of other rulemakings. Particular consideration should be paid to the comprehensive social, economic, and health effects of the entire network of rulemakings and whether rules impose duplicative burdens for negligible net benefits. Abatement will also permit the agency an opportunity to consult with parties in the litigation about revisions to particular rules that might resolve individual grievances.

We appreciate that your agency has many priorities and matters to which to attend and that this request will require substantial deliberation. However, in order to save everyone time and resources, please consider an immediate suspension of any and all active litigation and new regulatory enforcement while the EPA conducts its review and reconsideration of these matters.

We appreciate and thank you for your attention to this matter.

Sincerely yours,

Priscilla M. Hubenak
Chief, Environmental Protection Division
Office of the Attorney General of Texas

Attachments

cc: Ms. Sarah Rees, Director
Office of Regulatory Policy and Management
Office of Policy
Environmental Protection Agency
Mail Code 1803A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

ATTACHMENT 1

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 7, 2017

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460

Re: Request to reexamine delegation of certain environmental regulation authority to the States in accordance with the express terms of the Clean Air and Water Acts; from State of Texas, from State of Alabama, from State of Arizona, from State of Arkansas, from State of Georgia, from State of Indiana, from State of Kansas, from State of Kentucky, from State of Louisiana, from State of Mississippi, from State of Missouri, from State of Montana, from State of Nebraska, from State of Nevada, from State of North Dakota, from State of Oklahoma, from State of South Carolina, from State of West Virginia, from State of Wyoming

Dear Administrator Pruitt:

We write to call your attention to the fact that the extensive regulation from the Environmental Protection Agency during the last decade is directly at odds with the express terms and structure of the Clean Air Act and Clean Water Act. We ask that as you assess the performance of your Agency, you do so with a keen eye toward compliance with these governing laws and not repugnance to them.

These federal laws acknowledge basic truths: that the primary regulators of the environment are the States and local governments. The Clean Air Act wastes no time making this point. The very first section states that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). The Clean Air Act then establishes a preferred method for the federal government to assist States and local governments: "to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs." *Id.* § 7401(b)(3). The Act's terms such as "encourage," "assist," and "promote" envision a collaborative arrangement.[1] As one court summarized,

[1] The Clean Water Act is based on a collaborative framework that is substantially similar to the cooperative arrangement underlying the Clear Air Act. *See, e.g.*, 33 U.S.C. § 1251(b) (providing that the policy of the Clear Water Act is to preserve the "primary responsibilities of States to prevent, reduce, and eliminate" water pollution).

"[t]he great flexibility accorded the states under the Clean Air Act is ... illustrated by the sharply contrasting, narrow role to be played by EPA." *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981).

The methods we have seen from the Agency as of late, however, are in direct conflict with the cooperative arrangement the Act establishes. The Agency has replaced "encourage" and "promote" with "command" and "commandeer." Take one recent example. Texas formulated a state implementation plan for Regional Haze. That plan imposed reasonable regulations on such things as power generators in the State to ensure air quality was sufficiently high to allow good visibility. The Agency rejected the State's plan, imposed a federal plan costing $2 billion without achieving any visibility changes, and tried to insulate itself by requiring Texas to challenge the rejection of its plan in the D.C. Circuit.

Unsurprisingly, the Fifth Circuit rejected the Agency's attempt to transfer venue and stayed the federal plan.[2] At that point, the Agency had the opportunity to return to using its authority under the Act—rather than acting on its own. Instead, the Agency imposed a renewed regional haze rule almost as bad as the first.[3] These actions show that the Agency ignored the efforts of the State, perhaps blinded by the belief that good results can only result from top down management by the federal government. Or worse, the prior Administration's agenda and policy goals drove the Agency's decision rather than the requirements of the statute.

The federal government must respect the clear terms of cooperative federal-state enactments. For example, federal agencies may not add conditions on the receipt of federal funds unless the terms are clearly stated in the controlling statute. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). And federal agencies may not stray outside the boundaries of their statutory authority by relying on policy documents and other non-statutory materials. *See, e.g., Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 931 (5th Cir. 2012).

Similarly, the federal government may interpose itself between a State and its municipal subdivisions only if Congress provides a clear directive to do so. *Tennessee v. FEC*, 832 F.3d 597, 610 (6th Cir. 2016). From our perspective, the recent overreach by the Agency amounts to a striking departure from the Clean Air and Clean Water Acts. Respectfully, we ask that you consider the steps that the Agency may take to restore the principles of cooperative federalism embodied in these important statutes.

Sincerely yours,

---

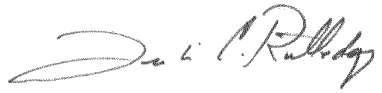
[2] *Texas v. United States Envtl. Prot. Agency*, 829 F.3d 405 (5th Cir. 2016).

[3] 82 Fed. Reg. 3,078 (Jan. 10, 2017)

Ken Paxton
Attorney General of Texas

Stephen T. Marshall
Attorney General of Alabama

Mark Brnovich
Attorney General of Arizona



Leslie Rutledge
Attorney General of Arkansas

Christopher Carr
Attorney General of Georgia

Curtis T. Hill, Jr.
Attorney General of Indiana

Derek S. Schmidt
Attorney General of Kansas

Matt Bevin
Governor of Kentucky

Jeff Landry
Attorney General of Louisiana

Phil Bryant
Governor of Mississippi

John Hawley
Attorney General of Missouri

Tim Fox
Attorney General of Montana

Douglas Peterson
Attorney General of Nebraska

Adam Paul Laxalt
Attorney General of Nevada

Wayne Stenehjem
Attorney General of North Dakota

Mike Hunter
Attorney General of Oklahoma

Alan Wilson
Attorney General of South Carolina

Patrick Morrisey
Attorney General of West Virginia

Peter Michael
Attorney General of Wyoming

cc: Hon. Jeff Sessions, United States Attorney General

ATTACHMENT 2

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)	*Texas v. EPA*, 16-1428; consolidated with *Wisconsin v. EPA*, 16-1406 (D.C. Cir.)	On 12/20/16, the State of Texas filed its petition for review. The case is pending a briefing schedule. DOJ has NOT requested abatement of the case.	No.
Air Quality Designations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard, 81 Fed. Reg. 89,870 (Dec. 13, 2016)	*Texas v. EPA,* 17-60088 (5th Cir.) *Masias (Sierra Club) v. EPA*, 16-1314 (*Texas v. EPA*, 17-1053) (D.C. Cir.)	On 2/13/17, Texas filed its petitions for review in the 5th Circuit and the D.C. Circuit. Despite this matter affecting only Texas, on 3/24/17, the DOJ filed a motion to dismiss Texas' filing in the 5th Circuit and seeks to transfer the matter to the D.C. Circuit and combine it with a matter filed by the Sierra Club (16-1314). The motion to dismiss/transfer is being briefed. The DOJ has NOT requested abatement of the case, and the parties await a decision from the court.	No.
Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology Determinations, Limited SIP Disapprovals, and Federal Implementation Plans, 77 Fed. Reg. 33,642 (June 7, 2012)	*Texas v. EPA*, 12-1344, consolidated with *Utility Air Regulatory Group v. EPA,* 12-1342, (D.C. Cir.)	On 8/6/12, the State of Texas filed its petition for review. Final briefs have been filed and the matter is pending oral argument. The DOJ has NOT requested abatement of the case.	No.
[Dis]approval and Promulgation of Air Quality Implementation Plans; Texas; Interstate Transport of Air Pollution for the 2008 Ozone NAAQS, 81 Fed. Reg. 53,284 (Aug. 12, 2016)	*Texas v. EPA*, 16-60670 (5th Cir.)	On 10/11/16, the State of Texas filed its petition for review. On 3/2/17, Texas filed its opening brief. DOJ abatement request pending.	Pending motion.
Protection of Visibility: Amendments to Requirements for State Plans, 82 Fed. Reg. 3078 (Jan. 10, 2017)	*Texas v. EPA*, 17-1021 (D.C. Cir.)	On 1/18/17 (docketed on 1/23/17), the State of Texas filed its petition for review. The case is pending a briefing schedule. DOJ abatement request pending.	Pending motion.

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015)	*Texas v. EPA*, 3:15-cv-00162 (S.D. Tex.); *Texas v. EPA*, 15-60492 (5th Cir.) *In re: EPA Final Rule*, No. 15-3751 (6th Cir.) (consolidated matter includes 15-3853 (Texas) *National Assoc. of Manufacturers v. Dept. of Def., No. 16-299 (U.S.)*	On 6/29/15, Texas filed its complaint challenging the rule in the S.D. Tex. and on 7/16/15 Texas filed a petition for review in the 5th Circuit. The 5th Cir. matter was transferred with others to the 6th Cir. Industrial petitioners brought a jurisdictional question to the Supreme Court, which is pending. The rule has been stayed pending judicial review. A DOJ request to abate the proceeding in the Supreme Court was denied.	No—Court denied, but rule stayed by order of the Court.
Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016)	*Texas v. EPA*, 16-1257, consolidated with *North Dakota, v. EPA*, 16-1242 (D.C. Cir.), and further consolidated with *American Petroleum Institute v. EPA*, 13-1108	On 7/28/16, the State of Texas filed its petition for review. The case is pending a briefing schedule. On 4/4/17, the EPA announced it was reconsidering this rule, 82 Fed. Reg. 16331. On 4/7/17, the DOJ requested abatement of the case, which remains pending.	DOJ requested on 4/7/17.
National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015)	*Texas v. EPA*, 15-1494, consolidated with *Murray Energy Corp. v. EPA*, 15-1385 (D.C. Cir.)	On 12/23/15, the State of Texas filed its petition for review. Briefing is complete and oral arguments were scheduled. The DOJ requested abatement of the case, which the Court granted on 4/11/17.	Yes—granted 4/11/17.
State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy, and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 80 Fed. Reg. 33,839 (June, 12, 2015)	*Texas v. EPA*, 15-1308, consolidated with *Walter Coke, Inc., v. EPA*, 15-1166(D.C. Cir.) *Luminant et al. v. EPA*, 15-60424 (5th Cir.) (transferred to D.C. Cir. on 8/31/15)	On 8/31/15, the State of Texas filed its petition for review in the D.C. Circuit and on 7/10/15 in the Fifth Circuit. On 8/31/15, the 5th Circuit matter was transferred and consolidated with the D.C. Circuit proceeding. Briefing is complete and oral arguments were scheduled. The DOJ requested abatement of the case, which the Court granted on 4/24/17.	Yes—granted 4/24/17.

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Supplemental Finding That it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal-and Oil-Fired Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) (4/16/12)	*Michigan et al. (Texas) v. EPA*, 16-1204 (6/24/16) (D.C. Cir.), consolidated with 16-1127 (D.C. Cir.)	On 6/24/16, Texas joined Michigan and others in filing a petition for review of the supplemental rule. Briefing is complete. The DOJ requested abatement of the case, which the Court granted on 4/27/17.	Yes—granted 4/27/17.
Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)	*North Dakota et al. (Texas) v. EPA,* 15-1381 (D.C. Cir.) *West Virginia et al. (Texas) v. EPA*, 15-1363 (D.C. Cir.)	On 10/23/15, Texas and others filed a petition for review of each of these rules. Briefing is complete. The DOJ requested abatement of the cases, which the Court granted on 4/28/17.	Yes—granted 4/28/17.

ATTACHMENT 3A

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and REGINA A. MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

Case No. 16-1428

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15(a), the State of Texas and the Texas Commission on Environmental Quality hereby petition this Court for review of the United States Environmental Protection Agency's (EPA) final rule titled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS," 81 Fed. Reg. 74,504. (October 26, 2016), a copy of which is enclosed with this filing (Attachment 1).

This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1). This petition for review is timely filed within sixty days of the date of publication of the final rule in the Federal Register. *Id.* The final rule is

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Clean Air Act § 307(d)(9), 42 U.S.C. § 7607(d)(9).

Dated: December 19, 2016

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

CRAIG J. PRITZLAFF
Assistant Attorney General
Court of Appeals–D.C. Circuit - Bar No. 56496
craig.pritzlaff@oag.texas.gov

LINDA B. SECORD
Assistant Attorney General
Application to D.C. Circuit process underway
linda.secord@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Petitioners,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, *Respondents*.	}	Case No. _____

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15(a), petitioners the State of Texas and the Texas Commission on Environmental Quality hereby petition this Court for review of the United States Environmental Protection Agency's (EPA) final action titled "Approval and Promulgation of Air Quality Implementation Plans; Texas; Interstate Transport of Air Pollution for the 2008 Ozone National Ambient Air Quality Standards" 81 Fed. Reg. 53,284 (August 12, 2016), a copy of which is enclosed with this filing.

This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1). The final action concerns disapproval of a portion of a state implementation plan prepared by Texas pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410, to implement in Texas certain provisions pertaining to the 2008 National Ambient Air Quality Standards. The final action was approved by the Regional

Administrator for EPA Region 6, pursuant to his delegated authority to act for the Administrator. Therefore, the final action is a locally or regionally applicable final action and is not "nationally applicable" or of "nationwide scope or effect." 42 U.S.C. § 7607(b). This petition for review is timely filed within sixty days of the date of publication of the Final Rule in the Federal Register. *Id.*

Dated: October 10, 2016

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

/s/ Priscilla M. Hubenak
PRISCILLA M. HUBENAK
Assistant Attorney General
Chief, Environmental Protection Division
State Bar No. 10144690
priscilla.hubenak@oag.texas.gov

CRAIG J. PRITZLAFF
Assistant Attorney General
State Bar No. 24046658
craig.pritzlaff@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

Counsel for Petitioners

CERTIFICATE OF SERVICE

On October 10, 2016, the foregoing Petition for Review was served by certified mail, return receipt requested, on:

Hon. Regina A. McCarthy
Office of the Administrator (1101A)
United States Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Hon. Loretta E. Lynch
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Pursuant to 40 C.F.R. § 23.12:

Correspondence Control Unit
Office of General Counsel (2311A)
United States Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington DC 20460

/s/ Priscilla H. Hubenak
PRISCILLA M. HUBENAK

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and REGINA A. MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

Case No. 17-1021

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15(a), the State of Texas and the Texas Commission on Environmental Quality hereby petition this Court for review of the United States Environmental Protection Agency's (EPA) final rule titled "Protection of Visibility: Amendments to Requirements for State Plans," 82 Fed. Reg. 3,078. (Jan. 10, 2017), a copy of which is enclosed with this filing (Attachment 1).

This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1). This petition for review is timely filed within sixty days of the date of publication of the final rule in the Federal Register. *Id.* The final rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Clean Air Act § 307(d)(9), 42 U.S.C. § 7607(d)(9).

Dated: January 18, 2017

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

CRAIG J. PRITZLAFF
Assistant Attorney General
Court of Appeals–D.C. Circuit - Bar No. 56496
craig.pritzlaff@oag.texas.gov

LINDA B. SECORD
Assistant Attorney General
Court of Appeals–D.C. Circuit - process underway
linda.secord@oag.texas.gov

MARK A. STEINBACH
Assistant Attorney General
Court of Appeals–D.C. Circuit Bar No. 59880
mark.steinbach@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Petitioners,

v.

Case No. 17-1053

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CATHERINE McCABE, in her official capacity as Administrator of the United States Environmental Protection Agency,

Respondents.

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15, the State of Texas and the Texas Commission on Environmental Quality (collectively, State of Texas) petition the Court for review of the United States Environmental Protection Agency's (EPA) final action entitled "Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS)," 81 Fed. Reg. 89,870 (Dec. 13, 2016), a copy of which is enclosed with this filing (Attachment 1).

Jurisdiction and venue for this petition is proper in the Fifth Circuit Court of Appeals because the Final Rule is a "locally or regionally applicable" final action of the EPA Administrator. *See* 42 U.S.C. § 7607(b). The State of Texas has accordingly filed a petition for review in the Fifth Circuit to challenge the rule. Because EPA has taken the position that the rule is of "nationwide scope and effect, 81 Fed. Reg. at 89875-76, and may argue that jurisdiction and venue are proper only in this Court, the State of Texas files this petition for review in this Court as a protective matter to preserve their right to judicial review.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for
Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

Nancy Elizabeth Olinger

NANCY ELIZABETH OLINGER
Assistant Attorney General

CRAIG J. PRITZLAFF
Assistant Attorney General

OFFICE OF THE TEXAS
ATTORNEY GENERAL
Environmental Protection Division (MC066)
P.O. Box 12548
Austin, Texas 78711-2548
Tel: (512) 475-4013
Fax: (512) 320-0911
nancy.olinger@oag.texas.gov
craig.pritzlaff@oag.texas.gov
Counsel for the State of Texas and Texas
Commission on Environmental Quality

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and CATHERINE McCABE, in her official capacity as Administrator of the United States Environmental Protection Agency,

Respondents.

Case No. _____

PETITION FOR REVIEW

In accordance with Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15, the State of Texas and the Texas Commission on Environmental Quality (collectively, State of Texas) petition the Court for review of the United States Environmental Protection Agency's (EPA) final action entitled "Air Quality Designations for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard (NAAQS)," 81 Fed. Reg. 89,870 (Dec. 13, 2016), a copy of which is enclosed with this filing (Attachment 1).

Jurisdiction and venue for this petition is proper in this Court under 42 U.S.C. § 7607(b). The Final Rule establishes air quality designations for four areas in the State of Texas for the SO_2 NAAQS. Therefore, the Final Rule is a locally or regionally applicable final action of the EPA Administrator and is not "nationally applicable" or "of nationwide scope or effect." 42 U.S.C. § 7607(b). This petition for review is timely filed within sixty days of the date of publication of the Final Rule in the Federal Register. *Id.*

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for
Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF
Assistant Attorney General

OFFICE OF THE TEXAS
ATTORNEY GENERAL
Environmental Protection Division (MC066)

P.O. Box 12548
Austin, Texas 78711-2548
Tel: (512) 475-4138
Fax: (512) 320-0911
craig.pritzlaff@oag.texas.gov
Counsel for the State of Texas and Texas Commission on Environmental Quality

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS
and
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
Petitioner

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent

Case No. 12-1344

PETITION FOR REVIEW

Pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), the State of Texas and Texas Commission on Environmental Quality hereby petition the court for review of the United State Environmental Protection Agency's final rule published in the Federal Register at 77 Fed. Reg. 33642 on June 7, 2012, titled "Regional Haze: Revisions to Provisions Governing Alternatives to Source-specific Best Available Retrofit Technology (BART) Determinations, Limited SIP disapprovals, and Federal Implementation Plans."

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JOHN B. SCOTT
Deputy Attorney General for Civil Litigation

JON NIERMANN
Chief, Environmental Protection Division

MARK L. WALTERS
Assistant Attorney General

OFFICE OF THE TEXAS ATTORNEY GENERAL
ENVIRONMENTAL PROTECTION DIVISION
P. O. Box 12548, MC-066
Austin, Texas 78711-2548
(512) 463-2012 Telephone
(512) 320-0911 Facsimile
Email: Mark.Walters@texasattorneygeneral.gov

CERTIFICATE OF SERVICE

On August 3, 2012, I served a copy of the foregoing *Petition for Review* by certified mail, return receipt requested, on the following parties of interest:

The Honorable Lisa Jackson
U.S. EPA
Office of the Administrator
1200 Pennsylvania Ave N.W.
Room 3000
Washington, D.C. 20450
Via: CMRRR #7007 1490 0000 0796 0305

Correspondence Control Unit
Office of General Counsel (2311)
U.S. EPA
1200 Pennsylvania Ave N.W.
Room 4000
Washington, D.C. 20460
Via: CMRRR #7007 1490 0000 0796 0299

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

STATE OF TEXAS,

Texas Department of Agriculture,
Texas Commission on Environmental Quality,
Texas Department of Transportation,
Texas General Land Office,
Railroad Commission of Texas,
Texas Water Development Board,

STATE OF LOUISIANA, and

STATE OF MISSISSIPPI,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA McCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works).

Defendants.

Case No. _____

COMPLAINT AND PETITION FOR REVIEW

TO THE HONORABLE UNITED STATES DISTRICT COURT:

1. This is a challenge to the legality of the final rule titled "Clean Water Rule: Definition of 'Waters of the United States,'" promulgated on June 29, 2015, by defendants United States Environmental Protection Agency; and the United States Army Corps of Engineers ("Federal Agencies"). Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg.

37,054 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) ("Final Rule").

2. The Final Rule is an unconstitutional and impermissible expansion of federal power over the states and their citizens and property owners. Whereas Congress defined the limits of its commerce power through the Clean Water Act to protect the quality of American waters, the Environmental Protection Agency and Army Corps of Engineers, through the Final Rule, are attempting to expand their authority to regulate water and land use by the states and their citizens. The success of protecting and improving the quality of American waters has come through the cooperative work of the states and the federal government. That success is threatened when administrative agencies attempt to substitute their judgment for decisions by Congress, the courts, and the states. Moreover, the very structure of the Constitution, and therefore liberty itself, is threatened when administrative agencies attempt toassert independent sovereignty and lawmaking authority that is superior to the states, Congress, and the courts.

3. The challenge is brought by the State of Texas, by and through its Attorney General, Ken Paxton, along with the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board. The challenge is also brought by the State of Louisiana, by and through its Attorney General, Buddy Caldwell, and the State of Mississippi, by and through its Attorney General, Jim Hood.

4. The Final Rule amends the definition of "Waters of the United States" under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* ("Clean Water Act" or "CWA"). A true and correct copy of the Final Rule is attached hereto at Exhibit A.

5. The Final Rule violates the Clean Water Act, the Administrative Procedure Act, and the United States Constitution, as noted below. Plaintiffs ask this Court to vacate the Final Rule, to enjoin the Federal Agencies from enforcing the Final Rule, and for any other relief as this Court deems proper.

I. PARTIES

6. Plaintiffs are the State of Texas, along with the Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, and Texas Water Development Board; the State of Louisiana; and the State of Mississippi.

7. The State of Texas and its state agencies, by and through its Attorney General, bring this suit to assert the rights of the state and also on behalf of its citizens.[1]

8. The State of Louisiana, by and through its Attorney General, James D. "Buddy" Caldwell, brings this suit pursuant to authority vested in its Attorney General to "institute, prosecute, or intervene in any civil action or proceeding" as "necessary for the assertion or protection of any right or interest of the state." La. Const. Art. IV, Sec. 8. The State of Louisiana also brings this action as *parens patriae* for all Louisiana residents who are adversely affected by the Final Rule's violations of the Clean Water Act, the Administrative Procedure Act, and the United States Constitution.

9. The State of Mississippi, by and through its Attorney General, Jim Hood, brings this suit pursuant to authority vested in its Attorney General "to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest" and "intervene and argue the constitutionality of any statute when notified of a challenge thereto." 7 Miss. Code § 7-5-1. The

[1] *See* Tex. Const. Art. 4, § 22; Tex. Gov't Code, Ch. 402; *see also* Tex H.B. 1, Art. IX, § 16.01, 82nd Tex. Leg., R.S. (2011).

State of Mississippi also brings this action as *parens patriae* for all Mississippi residents who are adversely affected by the Final Rule's violations of the Clean Water Act, the Administrative Procedure Act, and the United States Constitution.

10. Defendant United States Environmental Protection Agency ("EPA") is a federal agency within the meaning of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 551(1). Pursuant to the Clean Water Act, the EPA is provided with the authority, *inter alia*, to administer pollution control programs over navigable waters.

11. Defendant the Honorable Gina McCarthy is Administrator of the EPA and a signatory of the Final Rule.

12. Defendant United States Army Corps of Engineers ("Corps") is a federal agency within the meaning of the APA. *See* 5 U.S.C. § 551(1). The Corps, *inter alia*, administers the Clean Water Act's Section 404 program, regulating the discharge of dredged or fill material in navigable waters.

13. Defendant the Honorable Jo-Ellen Darcy is Assistant Secretary of the Army (Civil Works) and a signatory of the Final Rule.

II. JURISDICTION AND VENUE

14. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 (federal question), 2202 (further necessary relief), and 5 U.S.C. §§ 701–706 (APA). There is a present and actual controversy between the parties, and Plaintiffs are challenging a final agency action pursuant to 5 U.S.C. §§ 551(13), and 704. The Court may issue further necessary relief pursuant to 28 U.S.C. § 2202, 5 U.S.C. §§ 706(1), 706(2)(A) and (C), as well as pursuant to its general equitable powers.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(C), because (1) Defendants are either (a) agencies or instrumentalities of the United States or (b) officers or employees of the United States, acting in their official capacities; (2) Plaintiff State of Texas and its agencies are residents of the Southern District of Texas;[2] and (3) no real property is involved in this action.

16. Because there may be a dispute between the parties as to whether original jurisdiction to review the Final Rule lies in this Court, pursuant to 28 U.S.C. § 1331, or in the U.S. Court of Appeals for the Fifth Circuit, pursuant to 33 U.S.C. § 1369(b)(1), and because the deadline for a circuit court petition for review of this agency action is only 120 days, *id.*, Plaintiffs have—out of an abundance of caution—filed a petition in the U.S. Court of Appeals for the Fifth Circuit, to challenge the Final Rule on similar grounds as those asserted herein. Such "dual filing" is common and prudent when jurisdiction may be disputed, and "careful lawyers must apply for judicial review [in the court of appeals] of anything even remotely resembling" an action reviewable under section 509(b)(1), *see Am. Paper Inst. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989), even when they believe that jurisdiction may lie elsewhere. *See Cent. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 554 (2nd Cir. 1978) (complaint filed in district court and petition filed in circuit court "as a precaution").

III. BACKGROUND

A. The Clean Water Act Maintains the States' Regulatory Authority Over Land and Water

17. When Congress enacted the Clean Water Act Amendments of 1972, it made abundantly clear its goal to grant primary regulatory authority over land and waters to the States:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water

[2] *See Delaware v. Bender*, 370 F. Supp. 1193, 1200 (D. Del. 1974).

> resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b).

18. The Clean Water Act does, however, grant limited authority to the Federal Agencies to regulate the discharge of certain materials into "navigable waters." *See, e.g.*, 33 U.S.C. § 1251(a), 1342(a), 1344(a).

19. Congress defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

20. The meaning of "the waters of the United States" is significant, because it establishes, among other things, the waters for which the Federal Agencies can require Water Quality Standards ("WQS") and Total Maximum Daily Loads ("TMDLs"); the waters for which the Federal Agencies can administer permitting programs like the National Pollutant Discharge Elimination System ("NPDES") and section 404 dredge or fill permitting programs; and the waters for which the Federal Agencies can require state certifications for any discharge activity.

21. Obtaining a discharge permit is an expensive and uncertain endeavor that can take years of processing and cost hundreds of thousands of dollars. *See* U.S.C. §§ 1342, 1344. But discharging into a "water of the United States" without a permit can subject any person to civil penalties of up to $37,500 per violation, per day, as well as criminal penalties. *See Hanousek v. United States*, 528 U.S. 1102, 1103 (2000); *see also* 33 U.S.C. §§ 1311, 1319, 1365; 74 Fed. Reg. 626, 627 (2009).

22. In general, a broader definition of "the waters of the United States" will place more waters under federal authority. On the other hand, a more limited definition of "the waters of the United States" will place more waters under state and local authority. Therefore, the meaning of "the waters of the United States" is significant because it defines the parameters of cooperative

federalism under the Clean Water Act and determines whether Congress's wish "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources" will be honored. 33 U.S.C. § 1251(b).

B. The Meaning of "the Waters of the United States"

23. More than 100 years before the passage of the Clean Water Act Amendments of 1972, the Supreme Court defined the phrase "navigable waters of the United States" as "navigable in fact" interstate waters. *The Daniel Ball*, 10 Wall. 557, 563 (1871).

24. In 1974, the Corps issued a rule defining "navigable waters" as those waters that have been, are, or may be used for interstate or foreign commerce. 33 C.F.R. § 209.120(d)(1) (1974).

25. In 1986, the Corps issued another rulemaking, expanding its jurisdiction to include traditional navigable waters, tributaries of those waters, wetlands adjacent to those waters and tributaries, and waters used as habitat by migratory birds that either are protected by treaty or cross state lines. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986).

26. From 1986 to 2015, the regulatory definition of "the waters of the United States" remained unchanged. *See* 33 C.F.R. 328 (1986). Markedly, during that time, the only development of the definition was in the judicial branch, where the Supreme Court took an increasingly narrow interpretation of what constitutes "the waters of the United States." *See Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

i. *Riverside Bayview*

27. The Supreme Court first addressed the proper interpretation of "the waters of the United States" under the Clean Water Act in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

28. *Riverside Bayview* concerned a wetland that "was adjacent to a body of navigable water," because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to . . . a navigable waterway." *Id.* at 131.

29. The Supreme Court upheld the Corps' interpretation of "the waters of the United States" to include wetlands that "actually abut[ted]" on traditional navigable waters, finding that "the Corps must necessarily choose some point at which water ends and land begins." *Id.* at 132.

ii. *SWANCC*

30. Fifteen years later, in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* ("*SWANCC*"), the Supreme Court rejected the Corps' assertion of jurisdiction over any waters "[w]hich are or would be used as habitat" by migratory birds. 531 U.S. 159, 164 (2001) (quoting 51 Fed. Reg. 41,217 (1986)). The Court held that the Clean Water Act cannot be read to confer jurisdiction over physically isolated, wholly intrastate waters. *Id.* at 168. The Court found that "[i]n order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *Id.*

31. Observing that "[i]t was the *significant nexus* between the wetlands and the 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview*," the Court held that *Riverside Bayview* did not establish that federal jurisdiction "extends to ponds that are not adjacent to open water." *Id.* (emphasis added).

32. In *SWANCC*, the Court reiterated its holding in *Riverside Bayview* that federal jurisdiction extends to wetlands that actually abut navigable waters, because protection of these adjacent, actually-abutting wetlands was consistent with congressional intent to regulate wetlands that are "inseparably bound up with 'waters of the United States.'" *Id.* at 172 (quoting *Riverside Bayview*, 474 U.S. at 134).

iii. *Rapanos*

33. In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court again rejected the Corps' assertion of expanded authority over non-navigable, intrastate waters that are not significantly connected to navigable, interstate waters. The Court emphasized that the traditional concept of "navigable waters" must inform and limit the construction of the phrase "the waters of the United States." *Rapanos* raised the question of whether wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters" are "waters of the United States." *Rapanos*, 547 U.S. at 729. The court of appeals held they were, but the Supreme Court held that they were not. *Id.* at 716–17. The Court's majority consisted of two opinions, both of which rejected the Corps' assertion of jurisdiction.

34. Citing the ordinary meaning of "the waters of the United States," the four-justice plurality held that "waters of the United States" include "only relatively permanent, standing or flowing bodies of water," such as "streams, oceans, rivers, lakes, and bodies of water forming geographical features." *Id.* at 732–33 (internal quotation marks omitted). The plurality found that in going beyond this "commonsense understanding" and classifying waters like "ephemeral streams," "wet meadows," "man-made drainage ditches" and "dry arroyos in the middle of the desert" as "waters of the United States," the Corps had stretched the statutory text "beyond parody." *Id.* at 734 (internal quotation marks omitted). The plurality also rejected the view that

wetlands adjacent to ditches, when those ditches do not meet the definition of "waters of the United States," may nevertheless be subjected to federal regulation on the theory that they are "adjacent to" the remote "navigable waters" into which the ditches ultimately drain. *Id.* at 739–40.

35. Justice Kennedy concurred in the judgment, but noted that both the plurality and the dissent would expand CWA jurisdiction beyond permissible limits. He wrote that the plurality's coverage of "remote" wetlands with a surface connection to small streams would "permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach" (i.e., wetlands near to, but lacking a continuous surface connection with, navigable-in-fact waters). *Id.* at 776–77 (Kennedy, J., concurring in the judgment). This, he said, was "inconsistent with the Act's text, structure, and purpose." *Id.* at 776 (Kennedy, J., concurring in the judgment). As for the dissent, Justice Kennedy said the Act "does not extend so far" as to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778–79 (Kennedy, J., concurring in the judgment). As a result, Justice Kennedy rejected both sides' jurisdictional theories, refuting tests that rely on mere hydrologic connections to, and mere proximity to, navigable waters or features that drain into them.

36. Justice Kennedy employed a different test. In his view, the Corps may deem a water or wetland "a 'navigable water' under the Act" if it has a "significant nexus" to a traditional navigable water. *Id.* at 767 (Kennedy, J., concurring in the judgment). For "wetlands adjacent to navigable-in-fact waters," Justice Kennedy thought there is a "reasonable inference of ecologic interconnection" that is sufficient to sustain the Corps' "assertion of jurisdiction for those wetlands . . . by showing adjacency alone." *Id.* at 780 (Kennedy, J., concurring in the judgment). Justice Kennedy also said the Corps "may choose to identify categories of tributaries that, due to their

volume of flow (either annually or on average), the ir proximity to navigable waters, or other relevant considerations, are significant enough tha t wetlands adjacent to them are likely . . . to perform important functions for an aquatic system i ncorporating navigable waters." *Id.* at 781 (Kennedy, J., concurring in the judgment). But the Federal Agencies' regulations, which allow "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it," were so broad that they could not be "the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity" of traditional navigable waters. *Id.* "Indeed, in many cases wetlands adjacent to tribu taries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781–82 (Kennedy, J., concurring in the judgment). Given the over-breadth of the regula tions, Justice Kennedy concluded that the Corps "must establish a significant nexus on a case -by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries." *Id.* at 782 (Kennedy, J., concurring in the judgment).

37. Neither the plurality opinion nor Justice Kennedy's opinion in *Rapanos* repudiated any aspect of the *SWANCC* or *Riverside Bayview* decisions.

C. Despite Contrary Precedent, the Federal Agenci es Redefine "Waters of the United States" to Expand Clean Water Act Jurisdiction

38. On April 21, 2014, the Federal Agencies published f or comment "Definition of 'Waters of the United States' Under the Clean Water Act." *See* 79 Fed. Reg. 22,188 (proposed April 21, 2014) (to be codified at 33 C.F.R. pt. 32 8 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401) ("Proposed Rule").

39. The stated purpose for the rulemaking is to "defin[e] the scope of waters protected under the [CWA], in light of the statute, science, Supreme Court decisions . . . and the agencies'

technical expertise." Final Rule at 37,054. The Federal Agencies assert that the rule will "increase CWA program predictability and consistency by clari fying the scope of "waters of the United States" protected under the Act." *Id.*

40. On May 27, 2015, Administrator McCarthy and Assista nt Secretary Darcy took final agency action when they signed the Final Rule.

41. On June 29, 2015, the Final Rule was published in the Federal Register. This Rule amends 33 C.F.R. § 328 as well as 40 C.F.R. §§ 110, 112 116, 117, 122, 230, 232, 300, 302, and 401, to be effective as of August 28, 2015. Accordi ngly, the Federal Agencies' promulgation of the Final Rule is now ripe for judicial review.

i. The Final Rule Maintains *Per se* Federal Jurisdiction Over Certain Waters

42. The Final Rule reasserts that traditional navigable waters, interstate waters, territorial seas, and impoundments of jurisdictiona l waters are jurisdictional by rule. 33 C.F.R. § 328.3(a)(1)-(4) (2015).[3]

43. Plaintiffs do not dispute that these waters have traditionally been jurisdictional. For purposes of clarity, these waters will be referred to as "traditional waters".

ii. The Federal Agencies Broadly Define "Tributarie s" and Claim *Per se* Jurisdiction over All "Tributaries" of Traditional Waters

44. The Final Rule asserts that all "tributaries" of al traditional waters are jurisdictional by rule. *See id.* § 328.3(a)(5).

45. Furthermore, the Final Rule defines "tributary" for the first time as "a water that contributes flow, either directly or through anothe r water" to a traditional water and "is

[3] The Final Rule amends the definition of "the water s of the United States" under 33 C.F.R. § 328, as w ell as 40 C.F.R. §§ 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. For simplicity, Plaintiffs will only cite to 33 C.F.R. § 328, but Plaintiffs' arguments apply to all C.F.R. sections amended under the Final Rule.

characterized by the presence of the physical indic ators of a bed and bank and an ordinary high water mark." *Id.* § 328.3(c)(3).

46. Under the Final Rule, a tributary can be "natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches . . . ." *Id.* A water does not lose its classification as a tributary—even when it has man- made or natural breaks, no matter the length—"so long as a bed and banks and ordinary high watermark can be identified upstream of the break." *Id.*

47. "Ordinary high water mark" is defined as "that line on the shore established by the fluctuations of water and indicated by physical cha racteristics such as a clear, natural line impressed on the bank, shelving, changes in the cha racter of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means." *Id.* § 328.3(c)(6).

48. The Final Rule fails to account for frequency and d uration of flow, meaning the Federal Agencies can assert jurisdiction over "trib utaries" in the forms of dry ponds, ephemeral streams, intermittent channels, and even ditches—as long as the Federal Agencies can find a bed and banks and the existence, at some point in history, of an ordinary high water mark.

49. Despite championing Justice Kennedy's concurrence i n *Rapanos* throughout the Final Rule, the Federal Agencies ignore Justice Ken nedy's admonishment concerning the use of the "ordinary high water mark" as a determinative m easure for tributaries. Justice Kennedy stated that "the breadth of the standard—which seems to le ave wide room for regulation of drains, ditches, and streams remote from any navigable-in-f act water and carrying only minor water volumes toward it—precludes its adoption as the det erminative measure . . . ." *Rapanos*, 547 U.S.

at 782 (Kennedy, J., concurring in the judgment). [4] Not only do the Federal Agencies adopt the "ordinary high water mark" as a determinative measure for tributaries in the Final Rule—they greatly expand it from the Proposed Rule. The Proposed Rule required "the *presence* of a bed and banks and ordinary high water mark," *see* Proposed Rule at 22,199, while the Final Rule requires the "presence of *physical indicators* of a bed and banks and ordinary high water mark." 33 C.F.R. § 328.3(c)(3) (2015) (emphasis added).

50. Assuming, *arguendo*, that Justice Kennedy intended the "significant nexus" test in *Rapanos* to be stretched to tributaries, the Final Rule would fail that test, because it places all tributaries of traditional waters under the Federal Agencies' authority without regard to the tributaries' actual impact on the "chemical, physical, and biological integrity of" any traditional waters. *See Rapanos*, 547 U.S. at 717. Under the Final Rule, a tributary that only has a small, infrequent, and historically-traceable flow into a traditional water, is nevertheless within the Federal Agencies' jurisdiction. 33 C.F.R. § 328.3(c)(3) (2015).

51. The Final Rule's inclusion of tributaries also violates the plurality's opinion in *Rapanos* because the definition includes a feature with any flow into a traditional water, even if that flow does not constitute a "continuous surface connection." *Rapanos*, 547 U.S. at 742.

iii. The Federal Agencies Broadly Define "Significant Nexus" and Claim *Per se* Federal Jurisdiction Over Certain Waters They Deem to Have a "Significant Nexus" to Traditional Waters

52. For the purpose of determining whether or not a water has a "significant nexus," the Final Rule requires that the water's effect on a downstream traditional water be assessed by evaluating the following functions: (i) sediment trapping; (ii) nutrient recycling; (iii) pollutant

[4] The Federal Agencies contradict Justice Kennedy even further by explicitly including "ditches" in the regulatory definition of "tributary." *Compare* 33 C.F.R. § 328.3(a)(5), *with Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment).

trapping, transformation, filtering, and transport; (iv) retention and attenuation of flood waters; (v) runoff storage; (vi) contribution of flow; (vii) export of organic matter; (viii) export of food resources; and (ix) provision of life-cycle-dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a traditional navigable water, interstate water, and/or territorial sea. 33 C.F.R. § 328.3(c)(5) (2015).

53. Under the Final Rule, a water has a "significant nexus" "when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, and biological integrity" of the downstream traditional navigable water, interstate water, and/or territorial sea. *Id.* This definition exceeds Clean Water Act authority under *SWANCC* and *Rapanos*. In *SWANCC*, the Court refused the federal government's assertion of jurisdictional authority over an isolated, intrastate water because of the Migratory Bird Rule. *See SWANCC*, 531 U.S. at 168. Under the Final Rule's framework, the Federal Agencies have effectively reasserted the theory previously rejected in *SWANCC*—that the federal government can assert jurisdiction when, for example, the nesting of migratory birds, "alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, and biological integrity" of the downstream traditional navigable water, interstate water, and/or territorial sea. *See* 33 C.F.R. § 328.3(c)(5)(ix) (2015).

iv. The Federal Agencies Broadly Define "Adjacent Waters" and Claim *Per se* Jurisdiction Over All Adjacent Waters

54. The next category of waters deemed automatically jurisdictional by the Final Rule are all waters that are "adjacent" to traditional waters, impoundments, or tributaries. *See id.* § 328.3(a)(5). But in claiming *per se* jurisdiction over all "neighboring" waters—whether or not

there is a significant nexus and whether or not there is a continuous surface connection—the Final Rule goes beyond the authority of the Clean Water Act and the opinions in *Rapanos*.

55. "Adjacent waters" are waters "bordering, contiguous or neighboring" traditional waters, impoundments, or tributaries. *Id.* at § 328.3(c)(1). The category includes "wetlands, ponds, lakes, oxbows, impoundments, and similar water features," as well as "waters separated by constructed dikes or barriers, natural river berms, beach dunes." *Id.* at § 328.3(a)(5).

56. "Neighboring" is defined as "(1) [w]aters located in whole or part within 100 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, an impoundment of a jurisdictional water, or a tributary; . . .(2) [w]aters located in whole or part in the 100-year floodplain and that are within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, theterritorial seas, an impoundment of a jurisdictional water, or a tributary; . . . or (3) [w]aters located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas." *Id.* at § 328.3(c)(2).

57. Even when a water does not meet the criteria of "neighboring," it can still be jurisdictional as an "adjacent water" through a case-by-case significant-nexus analysis as proposed under the Final Rule. *See id.* at § 328.3(a)(7)–(8).

58. From a legal standpoint, the Final Rule's coverage of all "adjacent waters" fails both Justice Kennedy's and the plurality's tests under *Rapanos*.

59. The Final Rule's coverage of all "adjacent waters" is inconsistent with Justice Kennedy's approach because, among other things, it grants *per se* jurisdiction to waters that have no "significant nexus" to traditional waters of the United States. Instead, the Final Rule will establish federal jurisdiction over water features never contemplated under *SWANCC* or *Rapanos* by virtue of simply being near—not connected to—traditional waters of the United States. *See*

Rapanos, 547 U.S. at 779 (Kennedy, J., concurring in the judgment). The Final Rule's coverage of all "adjacent waters" is inconsistent with the plurality's test because, among other things, it grants *per se* jurisdiction to waters that have no "continuous surface connection" to traditional waters of the United States. *Id.* at 772 (Kennedy, J., concurring in the judgment).

60. From a practical standpoint, the Final Rule's definition of "adjacent waters" does nothing to further the Federal Agencies' express goal to "clarify the scope of waters protected under the CWA." For a landowner, including a state, to determine whether a particular water feature is subject to the Federal Agencies' jurisdiction (and, therefore, subject to permitting requirements under the CWA), the landowner would be forced to perform ~~or~~, more likely, pay an expert to perform ~~the~~ following analysis:

Step 1

Landowner must determine the location of the ordinary high water mark of the nearest traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary, as defined by the Final Rule;

⇩

Step 2

Landowner must determine whether any part of the feature at issue is within 100 feet of the ordinary high water mark *or* within 1,500 feet of the high tide line. If so, then the *entire water feature* is subject to federal jurisdiction. If not, the landowner can proceed to step 3;

⇩

Step 3

Landowner must determine where the 100-year floodplain is located [5] and whether any part of the feature at issue is within the 100-year floodplain of a traditional navigable water, interstate water, territorial sea, impoundment of a

[5] This may be a difficult task. When discussing their reliance on the 100-year floodplain in the preamble to the Final Rule, the Federal Agencies acknowledge that "much of the United States has not been mapped by FEMA and, in some cases, a particular map may be out of date and may not accurately represent existing circumstances on the ground. The agencies will determine if a particular map is no longer accurate based on factors, such as streams or rivers moving out of their channels with associated changes in the location of the floodplain. In the absence of applicable FEMA maps, or in circumstances where an existing FEMA map is deemed by the agencies to be out of date, the agencies will rely on other available tools to identify the 100-year floodplain . . . ." Final Rule at 37,081.

jurisdictional water, or tributary, as defined by the Final Rule. If so, proceed to Step 4. If not, proceed to Step 5.

Step 4

Landowner must determine whether any part of the feature at issue is within 1,500 feet of the ordinary high water mark of the water found in Step 3. If so, then the entire feature at issue is subject to federal jurisdiction. If not, Landowner must proceed to Step 5.

Step 5

Landowner must determine whether any part of the feature at issue is within 4,000 feet from the ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary, as defined by the Final Rule. If so, proceed to Step 6. If not, still proceed to Step 6.

Step 6

If any part of the feature at issue is within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea *or* within 4,000 feet from the ordinary high water mark of a traditional navigable water, interstate water, territorial sea, impoundment of a jurisdictional water, or tributary, as defined by the Final Rule, Landowner must then have a case-by-case significant nexus analysis performed on the feature at issue and the relevant water.

Step 7

If the Federal Agencies determine that the feature at issue has a significant nexus to the relevant traditional navigable water,interstate water, territorial sea, impoundment, or tributary, the feature is subject to federal jurisdiction. If the Federal Agencies determine that the feature does not have a significant nexus to the relevant traditional navigable water, interstate water, territorial sea, impoundment, or tributary, the feature at issue is not subject to federal jurisdiction.

61. It is unrealistic for the Federal Agencies to expect that landowners will possess the expertise, patience, and resources to employ this onerous test to determine whether their land can fall under the Final Rule's definition of "adjacent waters." Nor should states and their taxpayers

be forced to spend funds for such onerous jurisdictional determinations. Moreover, it is unrealistic for the Federal Agencies to expect that such a complicated standard can be applied predictably and consistently across the nation.

62. In addition to exceeding practicality and Supreme Court precedent, the Federal Agencies' promulgation of the broad definition of "adjacent waters" violates notice requirements under the APA.

63. The APA requires agencies to provide a "[g]eneral notice of proposed rulemaking" and provide "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . ." 5 U.S.C. §§ 553(b)–(c). This includes the requirement that an agency's final rule may differ from its proposed rule only to the extent that the final rule is a "logical outgrowth" of the rule as originally proposed. *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). And a final rule is a logical outgrowth of a proposed rule only to the extent that interested parties "'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

64. In both the Proposed Rule and the Final Rule, waters that are "adjacent" to traditional waters, and tributaries and impoundments of traditional waters, are themselves "waters of the United States." And, in both the proposed and final rules, "adjacent waters" include "neighboring waters." *See* Proposed Rule at 22,260; *see also* 33 C.F.R. § 328.3(a)(5) (2015).

65. In the Proposed Rule, however, neighboring waters were defined in terms of a hydrological connection. Specifically, "neighboring waters" were "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a

jurisdictional water." *See* Proposed Rule at 22,261, 22,271. Further, a "riparian area" was defined as "an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area." *Id.* In the Proposed Rule, the Federal Agencies' justification for regulating "adjacent waters" was based on what it deemed to be their "significant nexus"—as that term was used by Justice Kennedy—to traditional waters in that such adjacent waters "significantly affect the chemical, physical, and biological integrity of those waters." *Id.* at 22,260.

66. In the Final Rule, "riparian" is nowhere to be found, and the only reference to subsurface hydrology is in the exceptions to federal jurisdiction. 33 C.F.R. § 328.3(b)(5) (2015). Instead, the Final Rule defines "neighboring waters" exclusively in terms of distance—not hydrological connection—to traditional waters, impoundments, and tributaries. *See id.* § 328.3(c)(2).

67. There was no reason for Plaintiffs to anticipate a change in the definition of "adjacent" waters from hydrological connection to distance alone, especially because the latter is wholly without support in either the plurality opinion or Justice Kennedy's concurrence in *Rapanos*. Accordingly, the Final Rule's definition of "adjacent" waters is not a logical outgrowth of the Proposed Rule.

68. This sweeping inclusion of "adjacent" waters exceeds the Federal Agencies' authority under the Clean Water Act, violates the APA, and goes beyond the precedent established in *Riverside Bayview*, *SWANCC*, and *Rapanos*.

v. The Final Rule Establishes Two Categories of "Waters" that Will Be Evaluated on a Broad Case-by-Case Basis

69. Under the Final Rule, two categories of waters will be subjected to a case-by-case "significant nexus" analysis. The first category, referred to as "a(7) waters," identifies five specific

subcategories of "waters" that will be subject to c ase-by-case determinations. 33 C.F.R. § 328.3(a)(7) (2015). These include prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wet lands. *Id.* These "a(7) waters" are deemed jurisdictional when they are determined on a case-specific basis to have a "significant nexus" to a traditional navigable water, interstate water, or territorial sea. *Id.* The Final Rule further states that "a(7) waters" that lie within the same watershed ar e "similarly situated" by rule and, therefore, will be aggregated for purposes of the Federal Agen cies' significant nexus analysis. *Id.* § 328.3(c)(5).

70. The second category, referred to as "a(8) waters" a re "[a]ll waters located within the 100-year floodplain of a [traditional water] and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a [traditi onal water, tributary, or adjacent water]." *Id.* § 328.3(a)(8). These "a(8) waters" are deemed jurisdi ctional when they are determined on a case-specific basis to have a "significant nexus" to a traditional water. *Id.* Moreover, if only a "portion" of an "a(8) water" is determined to have a "signifi cant nexus" to a traditional water, the entire "a(8) water" is subject to CWA jurisdiction. *Id.*

71. Significantly, the Federal Agencies acknowledge in their own economic analysis of the Final Rule that "the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water , interstate water, or territorial sea" and that th e 100-year floodplain encompasses an even larger area.[6] Therefore, the Federal Agencies admit that the Final Rule will expose more than "the vast majo rity of the nation's water features" to the possibility of CWA jurisdiction.

[6] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 11, http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

72. This case-by-case, aggregating approach exceeds the Federal Agencies' authority under the Clean Water Act and goes beyond the precedent established in *SWANCC* and *Rapanos*.

vi. The Federal Agencies' Reliance on the "Significant Nexus" Standard Is Flawed, As Is Their Application of the Standard

73. In the preamble to the Final Rule, the Federal Agencies make clear that "[a]n important element of the agencies' interpretation of the CWA is the significant nexus standard . . . first informed by the ecological and hydrological connections the Supreme Court noted in *Riverside Bayview*, developed and established by the Supreme Court in *SWANCC*, and further refined in Justice Kennedy's opinion in *Rapanos*." Final Rule at 37,056.

74. In developing its "significant nexus" standard, however, the Final Rule relies almost exclusively on Justice Kennedy's concurrence in *Rapanos*. This reliance is misplaced. While the Federal Agencies will undoubtedly argue that relying on Justice Kennedy's concurrence is proper in a fractured opinion such as this, that opinion does not grant the Federal Agencies permission to exceed their authority under the Clean Water Act and the Constitution. Even Justice Kennedy acknowledged in *Rapanos* that "[t]o be sure, the significant-nexus requirement may not align perfectly with the traditional extent of federal authority." *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring in the judgment).

75. The Federal Agencies would have been more prudent to rely on the *Rapanos* plurality's holding that "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.' *Rapanos*, 547 U.S. at 739 (quoting Webster's New Int'l Dictionary 2882 (2d ed. 1954)). That standard is more expressly consistent with the goals of the Clean Water Act, *see* 33 U.S.C. §§ 1251(a)–(b), Congress's commerce power, and the underlying precedent in *Riverside Bayview* and *SWANCC*.

76. Instead, the Final Rule relies almost exclusively o n a "significant nexus" standard that goes far beyond what was contemplated by Justi ce Kennedy in *Rapanos* and eclipses any authority under *Riverside Bayview* and *SWANCC*.

77. In *Riverside Bayview*, the Supreme Court stated that "the waters of the United States" under the Clean Water Act referred primaril y to "rivers, streams, and other hydrographic features more conveniently identifiable as 'waters. '" 474 U.S. at 131. Nowhere did *Riverside Bayview* suggest that "the waters of the United States" sho uld include anything beyond that.

78. In *SWANCC*, the Supreme Court reiterated its holding in *Riverside Bayview* that wetlands that were "inseparably bound" up with traditional navigable waters constituted waters of the United States. *SWANCC*, 531 U.S. at 172. In clarifying its holding in *Riverside Bayview*, the *SWANCC* Court stated the "inseparability" between a wetlan d that *actually abutted* a traditional navigable water produced a "significant nexus" that guided the court's previous decision. *Id.* at 168 (emphasis added). *SWANCC* stated that under the Federal Agencies' concept of jurisdiction, the court would have to hold that the Clean Water A ct extends to waters that are not adjacent to open water, and "that the text of the statute will not allow this." *Id.* Therefore, nothing in either *Riverside Bayview* or *SWANCC* suggests that the concept of a "significant nexus" justifies CWA jurisdiction over anything beyond wetlands that *actually abut* traditional navigable waters.

79. Finally, in *Rapanos*, while Justice Kennedy further developed the "sign ificant nexus" concept, he maintained that the standard rem ained rooted in *Riverside Bayview*, where the court held that wetlands actually abutting navigabl e waters were jurisdictional because they are "integral parts of the aquatic environment" that Co ngress expressly chose to regulate. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring in the jud gment) (quoting *Riverside Bayview*, 474 U.S. at 135).

80. The Federal Agencies' almost exclusive reliance on a "significant nexus" standard does not provide a valid legal justification for the overly expansive definition of "the waters of the United States" in the Final Rule. The Final Rule still must comply with the Clean Water Act, the Constitution, and guiding precedent. It does not. On the contrary, the Final Rule attempts to confer federal jurisdiction to waters that were not contemplated as jurisdictional under any reasonable reading of *Rapanos*, *SWANCC*, and *Riverside Bayview*. Moreover, it is noteworthy that Justice Kennedy's concern was that both the majority- and minority-plurality opinions would expand CWA jurisdiction beyond permissible limits, *see Rapanos*, 547 U.S. at 776–77 (Kennedy, J., concurring in the judgment), thereby reinforcing Plaintiffs' position that the Federal Agencies are not properly relying on Justice Kennedy's "significant nexus" standard.

vii. The Final Rule Establishes Exclusions that Lack Certainty and Will Require Case-Specific Determinations

81. In broadly defining a number of new terms, the Federal Agencies have not only riddled the CWA with uncertain and unpredictable standards, but they have also made unclear which waters they explicitly intend to exclude from CWA jurisdiction.

82. The Final Rule excludes a list of seven types of water features, each of which contains limiting qualifications. Specifically, many of the exclusions only qualify if they "do not meet the definition of tributary," *see* 33 C.F.R. § 328.3(b)(4)(vi); "are not a relocated tributary or excavated in a tributary," *see id.* at § 328.3(b)(3)(i)–(ii); and are water features that were "created in dry land," *see id.* at §§ 328.3(b)(4)(i)–(v) and 328.3(b)(4)(vii).

83. As shown above, the Final Rule's definition of "tributary" is overbroad and in conflict with Justice Kennedy's concurrence in *Rapanos*. This will establish federal jurisdiction over waters—and lands—whose only defining characteristics are that they possess an historic "ordinary high water mark" and in some way "contribute flow."

84. Furthermore, the Federal Agencies do not define "dry land," nor do they state what "created in dry land" means. As a result, prudent p roperty owners, including the states, will not know whether certain water features meet these excl usions unless they expend significant resources to have the proper analyses performed all in an effort to prove to the Federal Agencies that their land should be excluded from CWA jurisdi ction, and with no guarantee that they will succeed in that effort.

D. The Final Rule Harms Plaintiffs

85. The Final Rule harms Plaintiffs by (1) expanding th e number of waters subject to federal regulation; (2) eroding the states' authori ties over their own waters; (3) increasing the states' burdens and diminishing the states' abiliti es to administer their own programs; and (4) undermining the states' sovereignty to regulate the ir internal affairs as guaranteed by the Constitution.

86. In their own economic analysis of the Final Rule, t he Federal Agencies estimate that had the Final Rule been in place during fiscal years 2013 and 2014 the agencies would have found that an additional 2.84 to 4.65 percent of "waters" were subject to CWA jurisdiction.[7] This contradicts the Federal Agencies' statement in the preamble to the Final Rule: "The scope of jurisdiction in this rule is narrower than that und er the existing regulation. Fewer waters will be defined as 'waters of the United States' under the rule than under the existing regulations." Final Rule at 37,054.

87. As a result, Plaintiffs will be required to establi sh water quality standards under CWA Section 303, 33 U.S.C. § 1313, for miles of new ly regulated waters that will likely include

[7] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 12–13, http://www2.epa.gov/sites/producti on/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

ephemeral tributaries, innumerable ponds, prairie p otholes, Texas coastal prairie wetlands, and ditches. The states will be required to certify that federal actions meet those standards under CWA Section 401, 33 U.S.C. § 1341. This will impose sig nificant, immediate harms to the states and state agencies involved in this action.

88. The Final Rule erodes Plaintiffs' authorities over their waters. The CWA clearly states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, r educe, and eliminate pollution, to plan the development and use . . . of land and water resourc es . . . ." 33 U.S.C. § 1251(b). Moreover, the Tenth Amendment provides States with traditional authority over their own lands and waters. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (holding that "regulation of land use [is] a function traditionally performed by local governments"). The Federal Rule would shift primary responsibility over traditional state lands and waters from the States to the federal government. This will impose significant, immediate harms to the States and state agencies involved in this action.

89. The Final Rule drastically increases Plaintiffs' bu rdens and harms Plaintiffs' abilities to administer their state programs. Becau se the Final Rule expands federal jurisdiction, state agencies will be forced to devote more resour ces to procuring CWA section 402 and 404 permits. For example, because the Final Rule define s "tributaries" to include ditches and flood channels, as well as features like prairie potholes and Texas coastal prairie wetlands, agencies will be forced to obtain CWA section 402 and/or 404 permits for work in those areas that may disturb

soil or otherwise add any pollutant that could affe ct those features. Individual CWA section 404 permits have a median cost of $155,000 and can take more than a year to obtain.[8]

90. Given the jurisdictional uncertainty that will be c aused by the Federal Agencies' definition of "adjacent waters" and the unpredictab ility of the Federal Agencies' significant nexus analysis, cautious, law-abiding landowners—includin g governmental entities—will be forced to expend resources if there is even a remote possibility that a project may affect a water of the United States. Moreover, the vagueness of the Final Rule and the requirement of states to inquire whether waters, on a case-by-case basis, are subject to CWA jurisdiction, tortures any notion that land- and water-use are traditional rights and responsibilities of the states.

91. These factors will impose significant, immediate ha rms to the States and state agencies involved in this action.

IV. CLAIMS FOR RELIEF

Claim One: The Final Rule Violates the Administrative Procedure Act

92. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as if set forth in full herein.

93. Under the APA, a final agency action may be held un lawful and set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . .; in excess of statutory jurisdiction, authority or limi tations . . .; or without observance of procedure required by law." 5 U.S.C. § 706(2).

94. The Clean Water Act only authorizes the Federal Age ncies to assert jurisdiction over "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1344, 1362(7).

[8] U.S. Envtl. Prot. Agency & U.S. Dep't of the Army, Economic Analysis of the EPA-Army Clean Water Rule (2015) at 35–39, http://www2.epa.gov/sites/producti on/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

95. The Final Rule exceeds the Federal Agencies' statutory authority and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" because it confers jurisdiction to the Federal Agencies over lands and waters that fall outside of the law established by the Clean Water Act, as interpreted by *Riverside Bayview*, *SWANCC*, and *Rapanos*. *See* 5 U.S.C. § 706(2).

96. Secondly, under the APA, an agency must provide a "[g]eneral notice of proposed rulemaking" and provide "interested persons an oppo rtunity to participate in the rulemaking through submission of written data, views, or argum ents . . . ." 5 U.S.C. §§ 553(b)–(c). This requirement includes the requirement that an administrative agency's final rule may differ from its proposed rule only to the extent that the final rule is a "logical outgrowth" of the rule as originally proposed. *See Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). And a final rule is a logical outgrowth of a proposed rule only to t he extent that interested parties "'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (quoting *Waukesha v. EPA*, 320 F.3d 228, 245 (D.C. Cir. 2003)).

97. For the reasons above, the Final Rule is not a "log ical outgrowth" of the proposed rule. Therefore, the Final Rule violates the APA, 5 U.S.C. §§ 553(b)–(c).

Claim Two: The Final Rule Violates the Commerce Clause

98. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as if set forth in full herein.

99. The federal government lacks a general police powerand may only exercise powers expressly granted to it by the Constitution. *See* U.S. CONST., amend. X.; *United States v. Lopez*, 514 U.S. 549, 566 (1995).

100. The Clean Water Act was enacted pursuant to Congres s's authority to regulate interstate commerce under Article I, Section 8 of the Constitution. As a result, the Federal Agencies violate the Constitution when their enforcement of the Clean Water Act extends beyond the regulation of interstate commerce. *See SWANCC*, 531 U.S. at 173; *see also United States v. Darby*, 312 U.S. 100, 119–20 (1941) (holding Congress may r egulate intrastate activity only where the activity has a "substantial effect" on interstate c ommerce).

101. The Final Rule violates the Constitution because it will subject to Clean Water Act jurisdiction thousands of miles of intrastate water s that have no substantial effect on interstate commerce. Regulating these waters falls outside the scope of Congress's—and, therefore, the Federal Agencies'—constitutional authority.

102. Therefore, the rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . .; in excess of stat utory jurisdiction, authority or limitations . . . ; or without observance of procedure required by law." 5 U.S.C. § 706(2).

C. Claim Three: The Final Rule Violates State Sovereignty and the Clear Statement Canon

103. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations set forth in all preceding paragraphs as set forth in full herein.

104. Under the Tenth Amendment, "[t]he powers not delega ted to the United States by the Constitution . . . are reserved to the States r espectively, or the people." U.S. CONST., amend. X.

105. The Final Rule encroaches upon the rights of the states to regulate lands within their borders. Land-use planning, regulation, and zoning are not enumerated powers granted to the federal government. They are the basic, fundamental functions of local governmental entities. Authority over these functions is reserved, traditi onally, to the states under the Tenth

Amendment. *See SWANCC*, 531 U.S. at 174 (recognizing the "States' tradition al and primary power over land and water use"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("Among the rights and powers reserved to the States under the Tenth Amendment is the authority to its land and water resources."); *FERC v. Mississippi*, 456 U.S. 742, 768, n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"); *see also* 33 U.S.C. § 1251(b).

106. The courts traditionally expect "a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into tradition al state authority." *Rapanos*, 547 U.S. at 738 (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). The phrase "the waters of the United States" does not constitute such a clear and manifest statement. *Id.* On the contrary, the Clean Water Act instructs the Federal Agencies to " recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). Thus, "wher e an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly c ontrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

107. Therefore, the Final Rule violates the Tenth Amendment, the clear statement canon, and 33 U.S.C. § 1251(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) Adjudge and declare that the rulemaking titled "Cle an Water Rule: Definition of 'Waters of the United States,'" promulgated in 33 CFR Part 328 and 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 is unlawful because it is inconsistent

with, and in excess of, the EPA's and U.S. Army Cor ps of Engineers' statutory authority under the CWA;

(2) Adjudge and declare that the Final Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with law;

(3) Adjudge and declare that the Final Rule violates the Constitution of the United States.

(4) Vacate the Final Rule;

(5) Award Plaintiffs their reasonable fees, costs, expe nses, and disbursements, including attorney's fees, associated with this litigation; a nd grant Plaintiffs such additional and further relief as the Court may deem just, proper, and necessary.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

BERNARD L. McNAMEE
Chief of Staff

SCOTT A. KELLER
Solicitor General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

JON NIERMANN
Chief, Environmental Protection Division

/s/ *Matthew B. Miller*
MATTHEW B. MILLER*
Assistant Attorney General
Texas Bar No. 24074722
matt.miller@texasattorneygeneral.gov
Southern District Admission Pending

LINDA B. SECORD
Assistant Attorney General
Texas Bar No. 17973400
linda.secord@texasattorneygeneral.gov
Southern District Bar No. 1850549

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel. (512) 463-2012
Fax. (512) 320-0911

Attorneys for the State of Texas

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana

TREY PHILIPS
First Assistant Attorney General

/s/ *Megan K. Terrell*
MEGAN K. TERRELL
Deputy Director – Civil Division
Chief – Environmental Section
Assistant Attorney General
La. Bar Roll No. 29443
Southern District ID No. 1850544
Office of the Louisiana Attorney General
1885 N. Third Street
Baton Rouge, Louisiana 70802
Phone: (225) 326-6020
Fax: (225) 326-6099

Attorneys for the State of Louisiana

JIM HOOD
Attorney General of the State of Mississippi

/s/ *Mary Jo Woods*
MARY JO WOODS*
Special Assistant Attorney General
Miss. Bar No. 10468
Mississippi Attorney General's Office
Post Office Box 220
Jackson, Mississippi 39205
Phone: (601) 359-3020
Facsimile: (601) 359-2003
Email: mwood@ago.state.ms.us

Attorneys for the State of Mississippi

* Motion and Order for Admission *Pro Hac Vice* filed with the Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, Texas Water Development Board, STATE OF LOUISIANA, and STATE OF MISSISSIPPI, *Petitioners,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency, UNITED STATES ARMY CORPS OF ENGINEERS, and JO-ELLEN DARCY, in her official capacity as Assistant Secretary of the Army (Civil Works). *Respondents.*	Case No. 15-60492

PETITION FOR REVIEW

Pursuant to Section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1), and Federal Rule of Appellate Procedure 15, the State of Texas, Texas Department of Agriculture, Texas Commission on Environmental Quality, Texas Department of Transportation, Texas General Land Office, Railroad Commission of Texas, Texas Water Development Board, State of Louisiana, and State of Mississippi petition the Court for

review of the rulemaking titled "Clean Water Rule: Definition of 'Waters of the United States,'" promulgated on June 29, 2015, by Respondents United States Environmental Protection Agency and United States Army Corps of Engineers. 80 Fed. Reg. 37,054 (June 29, 2015) ("Final Rule"). A copy of the Final Rule is enclosed with this filing.

Petitioners file this Petition for Review only out of an abundance of caution, and believe the Petition should be dismissed for lack of jurisdiction. In the Final Rule, EPA and the Corps suggest that a challenge to the Final Rule may fall within the court of appeals' jurisdiction under 33 U.S.C. § 1369(b)(1). *See* 80 Fed. Reg. at 37,104. Petitioners believe this is clearly incorrect as a matter of law, and that jurisdiction to review the Rule lies with district courts under 28 U.S.C. § 1331. *See Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012). Nevertheless, Petitioners file this Petition for Review as a protective matter, consistent with established practice. *See Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve*, 551 F.2d1270, 1280 (D.C. Cir 1997) ("If any doubt as to the proper forum exists, careful counsel should file suit in both the court of appeals and the district court or, since there would be no time bar to a proper action in the district court, bring suit only in the court of appeals."). Petitioners have also filed a complaint in the U.S. District Court for the Southern District of Texas, challenging the Final Rule on similar grounds as those that would be the subject of this Petition for Review.

Dated: July 13, 2015

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

BERNARD L. McNAMEE
Chief of Staff

SCOTT A. KELLER
Solicitor General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

JON NIERMANN
Chief, Environmental Protection Division

/s/ Matthew B. Miller
MATTHEW B. MILLER
Assistant Attorney General
State Bar No. 24074722
matt.miller@texasattorneygeneral.gov

LINDA B. SECORD
Assistant Attorney General
State Bar No. 17973400
linda.secord@texasattorneygeneral.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel. (512) 463-2012
Fax. (512) 320-0911

Attorneys for the State of Texas

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana

TREY PHILIPS
First Assistant Attorney General

/s/ Megan K. Terrell
MEGAN K. TERRELL
Deputy Director – Civil Division
Chief – Environmental Section
Assistant Attorney General
La. Bar Roll No. 29443
Office of the Louisiana Attorney General
1885 N. Third Street
Baton Rouge, Louisiana 70802
Phone: (225) 326-6020
Fax: (225) 326-6099

Attorneys for the State of Louisiana

JIM HOOD
Attorney General of the State of Mississippi

/s/ Mary Jo Woods
MARY JO WOODS
Special Assistant Attorney General
Miss. Bar No. 10468
Mississippi Attorney General's Office
Post Office Box 220
Jackson, Mississippi 39205
Phone: (601) 359-3020
Facsimile: (601) 359-2003
Email: mwood@ago.state.ms.us

Attorneys for the State of Mississippi

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS,
Railroad Commission of Texas, and
Texas Commission on Environmental Quality,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and REGINA A. MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,
Respondents.

Case No. 16-1257

ORIGINAL

PETITION FOR REVIEW

In accordance with the Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), 5 U.S.C. § 702, and Federal Rule of Appellate Procedure 15(a), petitioners the State of Texas, the Railroad Commission of Texas, and the Texas Commission on Environmental Quality, hereby petition this Court for review of respondent United States Environmental Protection Agency's final actions entitled: "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35824. (June 3, 2016), a copy of which is enclosed with this filing (Attachment 1).

This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1).

Dated: July 27, 2016

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

SCOTT KELLER
Solicitor General of Texas

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

CRAIG J. PRITZLAFF
Assistant Attorney General
Court of Appeals – D.C. Circuit - Bar No. 56496
craig.pritzlaff@texasattorneygeneral.gov

MARK A. STEINBACH
Assistant Attorney General
Application to D.C. Circuit pending
mark.steinbach@texasattorneygeneral.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS and
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and
REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency

Respondents.

Case No. 15-1494

PETITION FOR REVIEW

In accordance with 5 U.S.C. § 702, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15(a), petitioners the State of Texas and the Texas Commission on Environmental Quality hereby petition this Court for review of respondent United States Environmental Protection Agency's final action entitled "National Ambient Air Quality Standards for Ozone," 80 Fed. Reg. 65292 (October 26, 2015), a copy of which is enclosed with this filing. This Court has jurisdiction and is a proper venue for this action under 42 U.S.C. § 7607(b)(1).

Dated: December 22, 2015

Respectfully Submitted,

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

CRAIG J. PRITZLAFF
Deputy Chief, Environmental Protection Division

MATTHEW B. MILLER
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel. (512) 463-2012
Fax (512) 320-0911
matt.miller@texasattorneygeneral.gov

COUNSEL FOR PETITIONERS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,	)	
Petitioners,	)	
v.	)	**Case No. _____**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GINA MCCARTHY, in her official capacity as Administrator of the United States Environmental Protection Agency,	)	
Respondent.	)	

PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Federal Rule of Appellate Procedure 15, the State of Texas and the Texas Commission on Environmental Quality ("TCEQ") petition the Court for review of the Texas-applicable portions of the United States Environmental Protection Agency's ("EPA") final action on rulemaking titled *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and*

Malfunction, published in the *Federal Register* at 80 Fed. Reg. 33,839 on June 12, 2015, and attached to this petition as Exhibit 1.

Specifically, the State and TCEQ request that the Court review those parts of EPA's Final Rule that apply to the State of Texas, including: 1) EPA's finding under 42 U.S.C. § 7410(k)(5) that four provisions in Texas's approved State Implementation Plan ("SIP") (*i.e.*, 30 Tex. Admin. Code § 101.222(b), (c), (d) and (e), which provide affirmative defenses for certain upset events, unplanned events, and opacity events), "are substantially inadequate to meet [Clean Air Act] requirements"; and 2) EPA's "SIP call with respect to these provisions." 80 Fed. Reg. 33,968–69 (June 12, 2015).

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

JON NIERMANN
Chief, Environmental Protection Division

/s/ *Kellie E. Billings-Ray*
KELLIE E. BILLINGS-RAY
Assistant Attorney General
State Bar No. 24042447
kellie.billings-ray@texasattorneygeneral.gov

Priscilla M. Hubenak
Assistant Attorney General
State Bar No. 10144690
priscilla.hubenak@texasattorneygeneral.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel. (512) 463-2012
Fax. (512) 457-4638

ATTORNEYS FOR THE STATE OF TEXAS AND THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHIGAN ATTORNEY GENERAL BILL SCHUETTE, on behalf of the PEOPLE OF MICHIGAN, and the STATES OF ALABAMA, ARIZONA, ARKANSAS, KANSAS, KENTUCKY, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, WISCONSIN, and WYOMING, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PUBLIC UTILITY COMMISSION OF TEXAS, and RAILROAD COMMISSION OF TEXAS,

Petitioners,

v. Case No. 16-1204

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR REVIEW

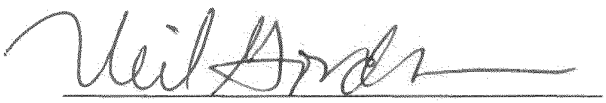
Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure, Fed. R. App. P. 15(a), Michigan Attorney General Bill Schuette, on behalf of the People of Michigan, the States of Alabama, Arizona, Arkansas, Kansas, Kentucky, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming, and the Texas Commission on Environmental Quality, Public

Utility Commission of Texas, and Railroad Commission of Texas hereby petition for review of the final action of the United States Environmental Protection Agency published in the Federal Register at 81 Fed. Reg. 24,420 (April 25, 2016) and titled "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units."

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom
Solicitor General



Neil D. Gordon (DC# 436522)
Assistant Attorney General
Counsel of Record
Brian J. Negele
Assistant Attorney General
ENRA Division
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 373-7540
Facsimile: (517) 373-1610
gordonn1@michigan.gov
negeleb@michigan.gov
Counsel for the People of Michigan

Dated: June 23, 2016

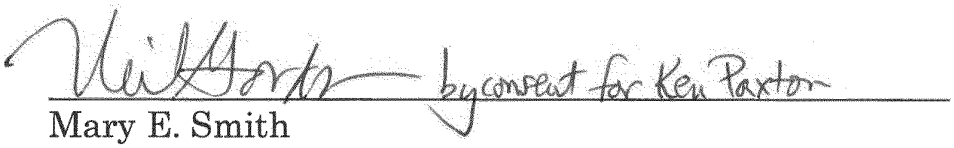
Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Brantley Starr
Deputy First Assistant Attorney General

James E. Davis
Deputy Attorney General for Civil Litigation

Priscilla M. Hubenak
Chief, Environmental Protection Division



Mary E. Smith
Assistant Attorney General
Mary.Smith@texasattorneygeneral.gov
Office of the Attorney General of Texas
Environmental Protection Division
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Telephone: (512) 475-4041
Facsimile: (512) 320-0911
Counsel for the State of Texas, Texas Commission on Environmental Quality, Public Utility Commission of Texas, and Railroad Commission of Texas

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA,
STATE OF TEXAS,
STATE OF ALABAMA,
STATE OF ARIZONA CORPORATION COMMISSION,
STATE OF ARKANSAS,
STATE OF COLORADO,
STATE OF FLORIDA,
STATE OF GEORGIA,
STATE OF INDIANA,
STATE OF KANSAS,
COMMONWEALTH OF KENTUCKY,
STATE OF LOUISIANA,
STATE OF LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY
ATTORNEY GENERAL BILL SCHUETTE, People of Michigan,
STATE OF MISSOURI,
STATE OF MONTANA,
STATE OF NEBRASKA,
STATE OF NEW JERSEY,
STATE OF NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY,
STATE OF OHIO,
STATE OF SOUTH CAROLINA,
STATE OF SOUTH DAKOTA,
STATE OF UTAH,
STATE OF WISCONSIN, and
STATE OF WYOMING,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
and REGINA A. MCCARTHY, Administrator, United States Environmental Protection Agency,

PETITION FOR REVIEW

Case No. 15-1363

ORIGINAL

Respondents.

The States of West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, and the Commonwealth of Kentucky, the Arizona Corporation Commission, the State of Louisiana Department of Environmental Quality, and the State of North Carolina Department of Environmental Quality hereby petition this Court, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and 5 U.S.C. § 702, for review of the final rule of the United States Environmental Protection Agency published in the Federal Register at 80 Fed. Reg. 64,662 (October 23, 2015) and titled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units." This Court has jurisdiction, and is a proper venue for this action, under 42 U.S.C. § 7607(b)(1).

Petitioners will show that the final rule is in excess of the agency's statutory authority, goes beyond the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law. Accordingly, Petitioners ask the Court to hold unlawful and set aside the rule, and to order other such relief as may be appropriate. *See* 42 U.S.C. § 7607(d).

Dated: October 23, 2015

Respectfully submitted,

Patrick Morrisey
Attorney General of West Virginia
Elbert Lin
Solicitor General
Counsel of Record
Misha Tseytlin
General Counsel
J. Zak Ritchie
Assistant Attorney General
State Capitol Building 1, Room 26-E
Tel. (304) 558-2021
Fax (304) 558-0140
Email: elbert.lin@wvago.gov
Counsel for Petitioner State of West Virginia

/s/ Scott A. Keller
Ken Paxton
Attorney General of Texas
Charles E. Roy
First Assistant Attorney General
Bernard L. McNamee II
Chief of Staff
Scott A. Keller
Solicitor General
Counsel of Record
P.O. Box 12548
Austin, Texas 78711-2548
Tel. (512) 936-1700
Email: Scott.Keller@texasattorneygeneral.gov
Counsel for Petitioner State of Texas

ATTACHMENT 3B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WISCONSIN, *et al.*, **Petitioners,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and Regina A. McCarthy, Administrator, United States Environmental Protection Agency** **Respondents.**	**No. 16-1406 and Consolidated Cases**
STATE OF TEXAS and the TEXAS COMMISSION ON ENVIRONMENTAL QUALITY **Petitioners,** **v.** **UNITED STATES ENRIRONMENTAL AGENCY,** **Respondent.**	**No 16-1428**

PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Petitioners, the State of Texas, and the Texas Commission on Environmental Quality, challenge the legality of the United States Environmental Protection Agency ("EPA") rulemaking entitled "Cross-State Air Pollution Rule Update for the

2008 Ozone NAAQS; Final Rule," published at 81 Fed. Reg. 74,504 (October 26, 2016) ("Final Rule"), and respectfully submit this preliminary and non-binding statement of issues:

1. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA failed to give independent significance to the distinct and separate requirements of Section 110(a)(2)(D)(i)(I) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)(I).

2. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA proposed a federal implementation plan for States before the EPA acted on state implementation plans, which States, such as Texas, previously submitted to implement § 7410(a)(2)(D)(i)(I).

3. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because the EPA fails to properly consider actual monitoring data and trends, and impermissibly relies on a model that is flawed with inappropriate assumptions and conditions.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civ. Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF
Assistant Attorney General
D.C. Circuit Bar No. 56496
craig.pritzlaff@oag.texas.gov

LINDA B. SECORD
Assistant Attorney General
D.C. Circuit application process underway
linda.secord@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY and E. Scott Pruitt, in his official capacity as Administrator of the United States Environmental Protection Agency, Respondents.	No. 17-1021 (and consolidated cases)

PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Petitioners, the State of Texas and the Texas Commission on Environmental Quality, challenge the legality of the United States Environmental Protection Agency ("EPA") rulemaking entitled "Protection of Visibility: Amendments to Requirements for State Plans," published at 82 Fed. Reg. 3,078 (Jan. 10, 2017) ("Final Rule"), and respectfully submit this preliminary and non-binding statement of issues:

1. Section 169A(d) of the Clean Air Act, 42 U.S.C. § 7491(d), provides that States shall consult and consider the conclusions and recommendations of a federal land manager ("FLM") when accepting public comment on state

implementation plans prepared to address the regional haze and visibility requirements of the Clean Air Act. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because it converts the statutory discretion States have in considering the conclusions of a federal land manager into a mandatory requirement that States must respond through costly formal revision of their regional haze state implementation plan. In particular, the Final Rule improperly mandates that States must revise their regional plans in response to a federal land manager's certification of reasonably attributable visibility impairment for a Class I air quality area listed pursuant to 42 U.S.C. § 7491(a).

2. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because it fails to properly address the impacts of international emissions of pollutants on visibility in Class 1 areas in the United States, especially those areas along or near an international border. In particular, the Final Rule fails to provide approved methodologies for states to address impacts from international emissions of pollutants and natural haze from the determination of reasonable progress toward reducing man-made pollution sources that effect visibility in Class I air quality areas.

3. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA did not properly consider the disproportionate costs imposed upon States to meet non-health based visibility goals,

which are more burdensome and costly to meet than health-based national ambient air quality standards. The burdens and costs to meet such goals are wholly disproportionate to any net benefit sought.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF
Assistant Attorney General
D.C. Circuit – Bar No. 56496
craig.pritzlaff@oag.texas.gov

LINDA B. SECORD
Assistant Attorney General
D.C. Circuit – Bar No. 60183
linda.secord@oag.texas.gov

MARK A. STEINBACH
Assistant Attorney General
D.C. Circuit – Bar No. 59880
mark.steinbach@oag.texas.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512)463-2012
Fax: (512) 320-0911

Counsel for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 25, I hereby certify that on March 31, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all CM/ECF registered counsel in this case, and all consolidated cases.

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al. *Respondents*.	Case No. 16-1257 (Consolidated with Nos. 16-1242, 16-1262; 16-1263; 16-1264; 16-1266, 16-1267; 16-1269; and 16-1270)

PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Petitioners, the State of Texas, the Railroad Commission of Texas, and the Texas Commission on Environmental Quality, challenge the legality of the United States Environmental Protection Agency ("EPA") rulemaking entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," published at 81 Fed. Reg. 35824 (June 3, 2016) ("Final Rule"), and respectfully submit this preliminary and non-binding statement of issues:

1. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA included facility source categories not originally included or contemplated in the listing of source categories as previously determined by the EPA under Section 111(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(b);

2. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA did not prepare an independent

endangerment finding for methane, which is used in the Final Rule as an improper surrogate for all other "greenhouse gases" included in the Final Rule;

3. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because the EPA did not prepare an independent endangerment finding for the oil and gas source category to establish standards of performance for methane and other greenhouse gas emissions from such sources in accordance with Sections 111(b) and 111(f) of the CAA, 42 U.S.C. §§ 7411(b) and 7411(f), and, therefore, the EPA failed to properly evaluate the scientific evidence concerning the effect of greenhouse gas emissions from the oil and gas source category, in particular methane, and otherwise disregarded data and analyses that conflicts with its decision to create standards for emissions of greenhouse gases from oil and gas facilities; and

4. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because the EPA did not base its cost/benefit estimates on reasoned bases and analyses, and, therefore, the EPA failed to properly consider the complete regulatory burden of the Final Rule on Texas' regulatory agencies and the oil and gas industry in Texas.

Respectfully Submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

SCOTT KELLER
Solicitor General of Texas

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF
Assistant Attorney General
Court of Appeals – D.C. Circuit - Bar No. 56496
craig.pritzlaff@texasattorneygeneral.gov

MARK A. STEINBACH
Assistant Attorney General
Court of Appeals – D.C. Circuit - Bar No. 59880
mark.steinbach@texasattorneygeneral.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC 066
Austin, Texas 78711-2548
Tel: (512) 463-2012
Fax: (512) 320-0911

Counsel for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on August 29, 2016, I served the foregoing document on all registered counsel in this case, and all consolidated cases, through the Court's CM/ECF system.

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF TEXAS, et al., *Petitioners*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al. *Respondents*.	Case No. 15-1494 (Consolidated with Nos. 15-1385, 15-1392, 15-1490, and 15-1491)

PETITIONERS' NON-BINDING STATEMENT OF ISSUES

Petitioners, the State of Texas and the Texas Commission on Environmental Quality, challenge the legality of the final agency rule entitled "National Ambient Air Quality Standards for Ozone," published at 80 Fed. Reg. 65292 (Oct. 26, 2015), and respectfully submit this preliminary and non-binding statement of issues:

1. Whether EPA's revision of the national ambient air quality standard for ozone ("ozone NAAQS") was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the Clean Air Act ("CAA") or any other laws;

2. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law because EPA failed to consider the effects that an unnecessarily stringent standard would have on Texas's social, economic, and sovereign interests;

3. Whether EPA 's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA failed to properly evaluate the scientific evidence and disregarded data and analyses that conflicted with its decision to lower the ozone NAAQS from 75 parts per billion ("ppb") to 70 ppb;

4. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA disregarded evidence showing that lowering the ozone NAAQS was unnecessary to protect human health;

5. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA ignored analyses from the Texas Commission on Environmental Quality and other entities that show no difference in ozone-inhaled dosage between 70 and 75 ppb;

6. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA failed to consider background levels of ozone, including those caused by mobile sources, stratospheric intrusion, bordering states, the Texas-Mexico border, as well as exceptional events and other factors over which Texas has no control;

7. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because EPA set a standard impossible for Texas to attain;

8. Whether EPA's revision of the ozone NAAQS was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the CAA because Texas is still devoting resources and working toward attaining the 2008 ozone NAAQS, making EPA's action premature and unnecessary; and

9. EPA's revision of the ozone NAAQS forms part of larger, comprehensive framework of recent rules promulgated by the EPA, some of which target the same underlying air pollutants at issue in the ozone NAAQS. EPA's other rule promulgations are the subject of meritorious challenges in this and other circuits. EPA has failed to consider the comprehensive social, economic, and health effects of these other rule changes, if implemented, and whether those rules will achieve the social, economic, and health effects intended in *this* promulgation—therefore subjecting Texas and other entities to duplicative and unnecessary expenditures.

Respectfully Submitted,

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division
Assistant Attorney General
priscilla.hubenak@texasattorneygeneral.gov

/s/ Matthew B. Miller
MATTHEW B. MILLER
Assistant Attorney General
matt.miller@texasattorneygeneral.gov
Lead Counsel

CRAIG J. PRITZLAFF
Assistant Attorney General
craig.pritzlaff@texasattorneygeneral.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel. (512) 463-2012
Fax (512) 320-0911

COUNSEL FOR PETITIONERS,
STATE OF TEXAS AND TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on February 3, 2016, I served the foregoing Petitioners' Non-Binding Statement of Issues on all registered counsel in this case, and all consolidated cases, through the Court's CM/ECF system.

/s/ Craig J. Pritzlaff
CRAIG J. PRITZLAFF
Assistant Attorney General

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHEASTERN LEGAL FOUNDATION, INC. ***Petitioner*,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al*.,** ***Respondents*.**	)	**Case No. 15-1166**
STATE OF TEXAS and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, ***Petitioners*,** **v.** **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,** ***Respondents*.**	)	**Case No. 15-1308 (consolidated with No. 15-1166 and other consolidated cases)**

STATE OF TEXAS AND TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S NONBINDING STATEMENT OF ISSUES

The State of Texas and the Texas Commission on Environmental Quality (collectively, the State of Texas), the petitioners in Case No. 15-1308 (consolidated

under Lead Case No. 15 -1166), submit this nonbinding statement of issues in this proceeding challengin g the final action of the respondent United States Environmental Protection Agency (EPA) entitled *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction*, 80 Fed. Reg. 33,839 (June 12, 2015) (Final Rule).

The following is a nonexclusive and nonbinding list of issues that the State of Texas may raise in this case:

1. Whether EPA's "substantial inadequacy" finding and "SIP Call" of Texas's state implementation plan (SIP) based on Texas's inclusion of affirmative defenses for maintenance, startup, and shutdown activities is unlawful and arbitrary and capricious because EPA failed to consider the language of 30 Texas Administrative Code § 101.222(f), providing that Texas's affirmative defense "applies only to violations of state implementation plan requirements [and] . . . cannot apply to violations of federally promulgated performance or technology based standards, such as those found in 40 Code of Federal Regulations Parts 60, 61, and 63";

2. Whether EPA's substantial inadequacy finding and SIP Call with regard to Texas's affirmative defense provisions is unlawful and arbitrary and

capricious based on the undisputed agency record that shows that Texas's affirmative defenses do not negate United States District Court jurisdiction;

3. Whether EPA must identify a specific provision of the Clean Air Act that Texas's affirmative defense provisions violate as a prerequisite to issuing a SIP Call;

4. Whether 42 U.S.C. § 7410(k)(5) permits EPA to issue a SIP Call when the only basis for that SIP Call is that a SIP provision is inconsistent with a newly issued EPA policy statement;

5. Whether EPA has provided any rational basis to determine that previously approved affirmative defenses for periods of maintenance, startup, and shutdown activities are now substantially inadequate to comply with the Clean Air Act;

6. With regard to Texas's SIP, whether EPA failed to comply with the statutory procedural requirements under 42 U.S.C. § 7607(d)—to include the requirement to provide an explanation of the "major legal interpretations and policy considerations underlying the proposed rule";

7. Whether EPA's revised policy disallowing the use of exemptions and affirmative defenses for periods of maintenance, startup, and shutdown activities is contrary to law, of any legal effect, entitled to any deference, or even enforceable;

8. Whether EPA's substantial inadequacy finding and SIP Call of Texas's SIP is unlawful and arbitrary and capricious because EPA's only stated rationale for its decision (that Texas's affirmative defense provisions "alter or eliminate the jurisdiction of federal courts to assess penalties for violations of SIP emission limits," 79 Fed. Reg. 55,945) is barred by principles of res judicata, claim preclusion, and issue preclusion by the Fifth Circuit Court of Appeals decision in Luminant Generation. *Luminant Generation Co. LLC v. Envtl. Prot. Agency* , 714 F.3d 841, 853 n. 9 (5th Cir. 2013) (holding that the same Texas affirmative defenses at issue here do not "negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties. . . . ");

9. Whether EPA's substantial inadequacy finding and SIP Call as to Texas's maintenance, startup, and shutdown affirmative defenses is unlawful and arbitrary and capricious because EPA's action di rectly contravenes the lawfully issued mandate in Luminant Generation. *Id*;

10. Whether EPA failed to meet its burden under 42 U.S.C. § 7410(k)(5) to demonstrate that the inclusion of affirmative defenses for maintenance, startup, and shutdown activities in Texas's SIP is substantially inadequate to co mply with the provisions of the Clean Air Act —particularly in light of the *Luminant Generation*

decision, holding that the affirmative defense provisions in Texas's SIP were compliant with the Clean Air Act. *Id*;

11. Whether EPA's disregard of the *Luminant Generation* decision is unlawful under this Court's decision in *NEDACAP v. EPA* and in light of EPA's regional consist ency regulations. *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. Envtl. Prot. Agency*, 752 F.3d 999 (D.C. Cir. 2014);

12. Whether EPA may use venue provisions under 42 U.S.C. § 7607(b)(1) and a self-declaration of "nationwide scope or effect" finding to circumvent binding Fifth Circuit Court of Appeals precedent; and

13. Whether EPA improperly relied on this Court's opinion in *NRDC v. EPA* to find Texas's affirmative defense provisions to be invalid —ignoring a Fifth Circuit Court of Appeals finding to the contrary *Compare Natural Res. Def. Council v. Envtl. Prot. Agency*, 749 F.3d 1055 (D.C. Cir. 2014), *with Luminant Generation*, 714 F.3d 841, 853 n. 9.

The State of Texas Petitioners submit these issues as a nonbinding statement only and reserve the right to raise other issues in merits briefing before the Court.

Respectfully submitted,

/s/ *Kellie E. Billings-Ray*
Kellie E. Billings-Ray

Counsel for the State of Texas and the Texas Commission on Environmental Quality:

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK
Chief, Environmental Protection Division

Kellie E. Billings-Ray
Assistant Attorney General
kellie.billings-ray@texasattorneygeneral.gov

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
ENVIRONMENTAL PROTECTION DIVISION
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Tel. (512) 463-2012
Fax. (512) 457-4638

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHIGAN ATTORNEY GENERAL BILL SCHUETTE, on behalf of the PEOPLE OF MICHIGAN, and the STATES OF ALABAMA, ARIZONA, ARKANSAS, KANSAS, KENTUCKY, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, WISCONSIN, and WYOMING, and TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PUBLIC UTILITY COMMISSION OF TEXAS, and RAILROAD COMMISSION OF TEXAS,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Case No. 16-1204/
Lead Case No. 16-1127
(and consolidated cases)

PETITIONERS' NON-BINDING STATEMENT OF ISSUES TO BE RAISED

Pursuant to the Court's Order of June 30, 2016, Petitioners in Case No. 16-1204 hereby submit the following non-binding statement of issues to be raised:

1. Whether the final action of the United States Environmental Protection Agency ("EPA") published in the Federal Register at 81 Fed.

Reg. 24,420 (April 25, 2016) and titled "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units" ("Supplement Finding") violates Section 112(n)(1)(A) of Clean Air Act, 42 U.S.C. § 7412(n)(1)(A), the Supreme Court's decision in *Michigan v. EPA*, 135 S.Ct. 2699 (2015), or is otherwise arbitrary, capricious, or unlawful because it is based on reductions in the emission of air pollutants that are not hazardous air pollutants and that are irrelevant to a finding of whether it is appropriate and necessary to regulate hazardous air pollutants under Section 112 of the Clean Air Act.

2. Whether EPA's Supplemental Finding violates Section 112(n)(1)(A) of the Clean Air Act, the Supreme Court's decision in *Michigan v. EPA*, or is otherwise arbitrary, capricious, or unlawful because EPA failed to balance the relevant costs and benefits.

3. Whether EPA's Supplemental Finding violates Section 112(n)(1)(A) of the Clean Air Act, the Supreme Court's decision in *Michigan v. EPA*, or is otherwise arbitrary, capricious, or unlawful because EPA failed to demonstrate that concentrations of particulate matter smaller than 2.5 micrometers in diameter ($PM_{2.5}$) in the ambient

air below the National Ambient Air Quality Standards for $PM_{2.5}$ provide public health benefits.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom
Solicitor General

/s/ Neil D. Gordon
Neil D. Gordon (DC# 436522)
Assistant Attorney General
Counsel of Record
Brian J. Negele
Assistant Attorney General
ENRA Division
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
Telephone: (517) 373-7540
Facsimile: (517) 373-1610
gordonn1@michigan.gov
negeleb@michigan.gov
Counsel for the People of Michigan

Dated: July 29, 2016

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Brantley Starr
Deputy First Assistant Attorney General

James E. Davis
Deputy Attorney General for Civil Litigation

Priscilla M. Hubenak
Chief, Environmental Protection Division

/s/ Mary E. Smith
Mary E. Smith
Assistant Attorney General
Mary.Smith@texasattorneygeneral.gov
Office of the Attorney General of Texas
Environmental Protection Division
P.O. Box 12548, MC-066
Austin, Texas 78711-2548
Telephone: (512) 475-4041
Facsimile: (512) 320-0911
Counsel for the State of Texas, Texas Commission on Environmental Quality, Public Utility Commission of Texas, and Railroad Commission of Texas

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

Case No. 15-1363
(and consolidated cases)

PETITIONERS' NONBINDING STATEMENT OF THE ISSUES TO BE RAISED

Pursuant to this Court's o rder dated November 30, 2015, *see* ECF 1585786, Petitioners in lead case No. 15-1363 and consolidated case No. 15-1409 submit the following nonbinding statement of issues to be raised in this proceeding reviewing the final rule of the United States Environmental Protection Agency (EPA) entitled, "Carbon Pollution E mission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("Rule"):

Core Legal Issues

1. Whether the Rule, which regulates existing power plants under CAA § 111(d), 42 U.S.C. § 7411(d), is unlawful because EPA has regulated the same power plants under CAA § 112, 42 U.S.C. § 7412.

2. Whether EPA has the authority to force States to transform thei r energy economies to favor only certain sources of electricity, under the guise of regulating power plants under CAA § 111(d), 42 U.S.C. § 7411(d).

3. Whether EPA's authority is limited to promulgating regulations to establish a "procedure" under which Stat es submit implementation plans in which the States establish "standards of performance" for existing sources under CAA § 111(d), 42 U.S.C. § 7411(d)(1).

4. Whether EPA's threat that it will seize control over the States' energy economies if they do not submit state plans violates the States' rights under the Tenth Amendment and the Federal Power Act, 16 U.S.C. § 824(a).

Programmatic or Record-Based Issues

1. Whether the Rule is unlawful because it is not a logical outgrowth of the proposed rule.

2. Whether the Rule' s exclusion of certain categories of sources of zero emission energy and sources of energy efficiency from the special incentives created under the Clean Energy Incentive Program is unlawful.

3. Whether the Rule allowing cap and trade as a compliance option f or meeting a "performance standard" is unlawful.

4. Whether the Rule requiring State Plans to regulate new, existing, or modified sources through means which include leakage provisions, set asides, and new source complements is unlawful.

5. Whether the Rule allowing States that choose a mass-based compliance plan to adopt a "state measures approach" and denying this option to States that choose a rate-based compliance plan is unlawful.

6. Whether the Rule's limitations on trading between rate-based and mass-based States are unlawful.

7. Whether the Rule is unlawful and violates due process because fundamental elements critical to the Rule are uncertain or unknown, including technical issues relating to emission rate credits (ERCs), or are currently non-final agency action, including the model trading rules and the federal plan

8. Whether the Rule's treatment of existing nuclear energy sources in Arkansas, particularly EPA's refusal to provide clean energy credit for Entergy's Arkansas Nuclear One power plant, is unlawful.

9. Whether EPA's failure to consider Florida's unique peninsular geography and the fact that only two States border Florida, thus limiting Florida's power transfer opportunities, is unlawful.

10. Whether EPA's failure to allow Florida to receive credit for decreases in emissions already achieved is unlawful.

11. Whether EPA's assumptions regarding the extent of renewable generation that could be developed in Florida and used to offset emissions from fossil fuel sources without accounting for intricacies and constraints on purchasing renewable energy under Florida law is unlawful.

12. Whether the Rule's failure to provide a method to account meaningfully for over three billion dollars in stranded investments made by Kansas utilities to install criteria pollutant control equipment on power plants in that State, is unlawful.

13. Whether the Rule's failure to provide compliance credit or emission rate credits for New Jersey's pre-2013, multi-billion dollar ratepayer investments in renewable energy, energy efficiency, and nuclear construction and uprates is unlawful.

14. Whether EPA has the authority to require New Jersey, an energy deregulated State that has chosen to eliminate the traditional retail monopoly structure which electric public utilities had previously held in th is State for electric power generation and supply services, to enact a new legislative scheme so that New Jersey can exercise the authority over electric generation facilities that is required to comply with the Clean Power Plan.

15. Whether the Rule's failure to significantly account for the cost of achieving emissions reductions in New Jersey is unlawful.

16. Whether the Rule's effect of severely limiting fuel diversity in New Jersey, thereby presenting significant reliability and cost concerns, especially during bouts of extreme weather, is unlawful.

17. Whether the Rule unlawfully threatens the reliability of electric supply in the South Dakota because the only coal -fired power plant and the only natural gas-fired power plant in the State lack common ownership, have different regional transmission operators, and do not share a common customer base.

18. Whether the Rule unlawfully forces Texas to redesign the Electric Reliability Council of Texas ("ERCOT"), which is the only Independent System Operator in the continental United States that operates an electricity market that is wholly contained within one State and is not synchronously interconnected with the rest of the country, and which has otherwise been a vibrant and extremely successful competitive wholesale and reta il electricity market for Texas.

19. Whether Texas is being unlawfully punished by the Rule as a first mover in the area of wind energy because, under the Rule, none of the renewable energy installed prior to January 6, 2013 (or capacity upgrades to existing renewable energy completed prior to that date) can be used by generators or the State to demonstrate compliance with the Rule.

20. Whether the Rule unlawfully applied a 4.3% heat rate improvement to Wisconsin steam power plants.

21. Whether the Rule unlawfully failed to consider biomass energy in developing the Wisconsin emission standard.

22. Whether EPA unlawfully failed to consider the impact of the Rule throughout Wyoming on the greater sage grouse and other sensitive species.

Dated: December 18, 2015

Respectfully submitted,

/s/ Elbert Lin
Patrick Morrisey
Attorney General of West Virginia
Elbert Lin
Solicitor General
Counsel of Record
J. Zak Ritchie
Assistant Attorney General
State Capitol Building 1, Room 26-E
Tel. (304) 558-2021
Fax (304) 558-0140
Email: elbert.lin@wvago.gov
Counsel for Petitioner State of West Virginia

/s/ Scott A. Keller
Ken Paxton
Attorney General of Texas
Charles E. Roy
First Assistant Attorney General
Scott A. Keller
Solicitor General
Counsel of Record
P.O. Box 12548
Austin, Texas 78711-2548
Tel. (512) 936-1700
Email:
Scott.Keller@texasattorneygeneral.gov
Counsel for Petitioner State of Texas

/s/ Andrew Brasher
Luther Strange
Attorney General of Alabama
Andrew Brasher
Solicitor General
Counsel of Record
501 Washington Ave.
Montgomery, AL 36130

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH DAKOTA, *et al.*, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.	Case No. 15-1381 (and consolidated cases)

PETITIONERS' NONBINDING STATEMENT OF THE ISSUES TO BE RAISED

Pursuant to this Court's order dated November 6, 2015, *see* ECF 1582440, Petitioners in case No. 15-1399 (consolidated with case No. 15-1381) submit the following nonbinding statement of issues to be raised in this proceeding:

1. Whether EPA's inclusion of carbon capture and storage (CCS) as part of the "best system of emission reduction" is improper because EPA fails to meet its burden to show that CCS is an "adequately demonstrated" technology as required by Clean Air Act Section 111(b), 42 U.S.C. § 7411.

2. Whether EPA failed to meet its burden to show that CCS is adequately demonstrated, because EPA improperly characterized the "adequately demonstrated" legal standard, as set out by Clean Air Act Section 111(b), 42

U.S.C. § 7411, as requiring merely a showing of the technology's "technical feasibility."

3. Whether EPA's inclusion of CCS as part of the "best system of emission reduction" is improper because EPA failed to meet its burden to show that CCS is the "best system" considering costs as required by Clean Air Act Section 111(b), 42 U.S.C. § 7411.

4. Whether EPA has failed to demonstrate that an emission standard of 1,400 lbs. CO_2/MWh, which effectively mandates that affected sources install CCS, is achievable as required by Clean Air Act Section 111(b), 42 U.S.C. § 7411.

5. Whether EPA violated the Energy Policy Act of 2005 by impermissibly considering government-funded technologies from facilities awarded either Clean Coal Power Initiative funding, *see* 42 U.S.C. § 15962, or Section 48A tax credits, *see* 26 U.S.C. § 48A, as evidence that CCS is an adequately demonstrated technology for purposes of Clean Air Act Section 111(b), 42 U.S.C. § 7411.

6. Whether EPA's decision to implement stringent new source performance standards is arbitrary and capricious because EPA's rule will, by EPA's admission, result in negligible CO_2 emission reductions.

7. Whether EPA failed to properly consider whether CO_2 emissions from new fossil fuel -fired power plants are "reasonably . . . anticipated to endanger public health or welfare" as required for EPA to regulate under Clean Air Ac t § 111(b), 42 U.S.C. § 7411.

8. Whether EPA's failure to adequately address infrastructure and carbon dioxide transportation costs in States without storage capacity violates the Administrative Procedures Act, 5 U.S. Code § 701 *et seq*.

Dated: December 7, 2015

Respectfully submitted,

/s/ Elbert Lin
Patrick Morrisey
Attorney General of West Virginia
Elbert Lin
Solicitor General
Counsel of Record
J. Zak Ritchie
Assistant Attorney General
State Capitol Building 1, Room 26-E
Tel. (304) 558-2021
Fax (304) 558-0140
Email: elbert.lin@wvago.gov
Counsel for Petitioner State of West Virginia

/s/ Andrew Brasher
Luther Strange
Attorney General of Alabama
Andrew Brasher
Solicitor General
Counsel of Record
501 Washington Ave.
Montgomery, AL 36130

James Emory Smith, Jr.
Deputy Solicitor General
Counsel of Record
P.O. Box 11549
Columbia, SC 29211
Tel. (803) 734-3680
Fax (803) 734-3677
Email: ESmith@scag.gov
Counsel for Petitioner State of South Carolina

/s/ Steven R. Blair
Marty J. Jackley
Attorney General of South Dakota
Steven R. Blair
Assistant Attorney General
Counsel of Record
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Tel. (605) 773-3215
Email: steven.blair@state.sd.us
Counsel for Petitioner State of South Dakota

/s/ Scott A. Keller
Ken Paxton
Attorney General of Texas
Charles E. Roy
First Assistant Attorney General
Bernard L. McNamee II
Chief of Staff
Scott A. Keller
Solicitor General
Counsel of Record
P.O. Box 12548
Austin, Texas 78711-2548
Tel. (512) 936-1700
Email:
Scott.Keller@texasattorneygeneral.gov
Counsel for Petitioner State of Texas

To: Koerber, Mike[Koerber.Mike@epa.gov]; Lewis, Josh[Lewis.Josh@epa.gov]; Shaw, Betsy[Shaw.Betsy@epa.gov]
From: Stenger, Wren
Sent: Thur 5/25/2017 1:52:52 PM
Subject: FW: Texas case table
TX OAG Letter.pdf
TX OAG Case List.pdf
2017 TX EGU cases 05 11 3017 pdf.pdf

FYI

From: Coleman, Sam
Sent: Wednesday, May 24, 2017 5:25 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Cc: Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: RE: Texas case table

I attached three files. The TX AG sent a letter as part of the Reg Reform Docket that included their version of the ongoing litigation with EPA.. I also attached an EPA version responding to the same question.

We are planning the meeting with the State, that we previously discussed. I wanted everyone to have these background documents.

Next steps

1. TCEQ met with the Gov Ofc yesterday and plans to meet with the EGU owners on 31 May.

2. We will begin to look at dates in June 2017 for a TX-EPA meeting. We can have a "Policy" meeting first, or have a larger meeting that would include DOJ and the TX AG. Please give me some feedback on the Agency preference.

3. EPA should plan on an extended conf call to discuss the scope and content of the meeting in the near future. I propose later next week when we can get some feedback from the State on

their meeting with EGU owners

4. Schedule and implement when our plan is agreed to.

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Coleman, Sam
Sent: Thursday, May 11, 2017 12:09 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Fwd: Texas case table

Thanks to OGC and my R6 team, Attached is the collaborative effort to capture the essence of the litigation ongoing regarding EGUs and the State of TX. As you can see there is overlap is a number of areas with respect to pollutants and facilities. Additionally, everything is NOT on a coordinated schedule.

Further briefing and discussion is likely appropriate. Let me know if there are questions.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

Begin forwarded message:

From: "Payne, James" <payne.james@epa.gov>
Date: May 11, 2017 at 11:45:58 AM CDT
To: "Schoellkopf, Lynde" <Schoellkopf.Lynde@epa.gov>, "Coleman, Sam" <Coleman.Sam@epa.gov>, "Stenger, Wren" <stenger.wren@epa.gov>, "Donaldson, Guy" <Donaldson.Guy@epa.gov>
Cc: "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: Texas case table

Lynde - thanks to you and team.

Sam and all - this version of the table can be share with Texas or others. The "Potential Pathways" column is removed and the rest of the table has been edited so it can be shared outside the agency.

Jim

Sent from my iPhone

Begin forwarded message:

From: "Schoellkopf, Lynde" <Schoellkopf.Lynde@epa.gov>
To: "Payne, James" <payne.james@epa.gov>, "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: revised litigation table

Jim,

Kristi Smith provided 3 minor comments that I've incorporated into the revised attachment. We should be okay to circulate this as needed. Suzanne mentioned that Kristi plans to set up meetings with OAR in the future to discuss all of this. Thanks!

Lynde J. Schoellkopf

U.S. EPA

Office of Regional Counsel

1445 Ross Ave.

Dallas, TX 75202

From: Payne, James
Location: Ex. 6 - Personal Privacy
Importance: Normal
Subject: Texas Regional Haze
Start Date/Time: Tue 4/25/2017 9:30:00 PM
End Date/Time: Tue 4/25/2017 10:30:00 PM
4_20 TX RH SO2 BART briefing.docx
Texas Regional Haze SIP needs 4grd_24.docx

Agenda includes: .

1. Attorney call with TCEQ

- TCEQ says they're available this Thurs 3-4pm EASTERN or this Fri aft

2. Path forward document to TCEQ

- Timing: tomorrow/Wed

- Contents: pages 1-3 of attached 6-page document which was reviewed during the internal call last Thurs 11am EASTERN. With any editing – e.g., to remove 'lit risk' statements etc.

o See also separate attached doc which has some edits to page 1 of that doc.

From: Dunham, Sarah
Location: WJC-N 5400 + Video with RTP + Ex. 6 - Personal Privacy Participant Code: Ex. 6 - Personal Privacy
Importance: Normal
Subject: Texas Regional Haze
Start Date/Time: Thur 4/20/2017 3:00:00 PM
End Date/Time: Thur 4/20/2017 3:45:00 PM
4_20 TX RH SO2 BART briefing.docx

To: Dunham, Sarah; Lewis, Josh; Page, Steve; Koerber, Mike; Schmidt, Lorie; Schwab, Justin; Gunasekara, Mandy; Zenick, Elliott; Kornylak, Vera; Coleman, Sam; Stenger, Wren; Wood, Anna; Jones, Rhea; Harvey, Reid
Cc: Williams, Odessa; Alston, Lala

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Smith, Kristi
Sent: Mon 5/8/2017 5:30:19 PM
Subject: RE: Texas Issues

Thanks. Can you respond that OGC will have the lead in contacting DOJ?

Kristi M. Smith * Assistant General Counsel for the NAAQS Implementation Group * Air & Radiation Law Office * US EPA, Office of General Counsel * smith.kristi@epa.gov * (202) 564-3068 *

From: Schmidt, Lorie
Sent: Monday, May 08, 2017 1:23 PM
To: Smith, Kristi <Smith.Kristi@epa.gov>
Subject: FW: Texas Issues

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Coleman, Sam
Sent: Monday, May 08, 2017 11:43 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>

Subject: RE: Texas Issues

Thanks. There is a filing deadline on 2008 Ozone Transport SIP litigation imposed by DOJ of this Friday (12 May). Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Who has the lead on contacting DOJ?

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Gunasekara, Mandy
Sent: Thursday, May 04, 2017 12:31 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Coleman, Sam <Coleman.Sam@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Re: Texas Issues

Yes- let's do it

Sent from my iPhone

On May 4, 2017, at 12:53 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

For my part this sounds worth considering; I will be interested in hearing other people's views, however.

Sent from my iPhone

On May 4, 2017, at 11:13 AM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:

Last summer EPA, TCEQ and the EGU owners in TX met to attempt global settlement on Haze and on a couple of related issues, Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Given the current situation, I was wondering if EPA might be interested in having a thoughtful and organized discussion with the state, and the EGUs. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Is EPA interested in convening such a meeting? If so, I would like to schedule a call to discuss format and logistics. Please let me know.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Anderson, Lea[anderson.lea@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Greenglass, Nora[Greenglass.Nora@epa.gov]
From: Zenick, Elliott
Sent: Wed 7/12/2017 1:58:04 AM
Subject: Fwd: Draft Discussion Document for TX RH SIP Approach.docx
Draft Discussion Document for TX RH SIP Approach.docx
ATT00001.htm

We should discuss in the morning.

NSPS\Regional Haze Practice Group
202-564-1822

Begin forwarded message:

From: "Wiley, Adina" <Wiley.Adina@epa.gov>
Date: July 11, 2017 at 7:05:32 PM EDT
To: "Stenger, Wren" <stenger.wren@epa.gov>, "Coleman, Sam" <Coleman.Sam@epa.gov>, "Donaldson, Guy" <Donaldson.Guy@epa.gov>, "Feldman, Michael" <Feldman.Michael@epa.gov>, "Payne, James" <payne.james@epa.gov>
Cc: "Olszewski, Joshua" <olszewski.joshua@epa.gov>, "Todd, Robert" <Todd.Robert@epa.gov>, "Zenick, Elliott" <Zenick.Elliott@epa.gov>, "Watson, Lucinda" <Watson.Lucinda@epa.gov>, "Price, Lisa" <Price.Lisa@epa.gov>, "Lorang, Phil" <Lorang.Phil@epa.gov>, "Beaver, Melinda" <Beaver.Melinda@epa.gov>, "Koerber, Mike" <Koerber.Mike@epa.gov>, "Wood, Anna" <Wood.Anna@epa.gov>
Subject: Draft Discussion Document for TX RH SIP Approach.docx

Draft discussion document for use on 7/12/2017.

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Anderson, Lea[anderson.lea@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]
From: Zenick, Elliott
Sent: Tue 7/11/2017 10:34:20 PM
Subject: Fwd: TX BART and RP Goals One Pager
TX BART and RP Goals.docx
ATT00001.htm
EPA-HQ-OAR-2011-0729-0358.pdf
ATT00002.htm

On a call with the region right now. Happy to discuss

NSPS\Regional Haze Practice Group
202-564-1822

Begin forwarded message:

From: "Wiley, Adina" <Wiley.Adina@epa.gov>
Date: July 11, 2017 at 6:29:23 PM EDT
To: "Feldman, Michael" <Feldman.Michael@epa.gov>, "Olszewski, Joshua" <olszewski.joshua@epa.gov>, "Donaldson, Guy" <Donaldson.Guy@epa.gov>, "Todd, Robert" <Todd.Robert@epa.gov>, "Zenick, Elliott" <Zenick.Elliott@epa.gov>, "Payne, James" <payne.james@epa.gov>, "Stenger, Wren" <stenger.wren@epa.gov>, "Watson, Lucinda" <Watson.Lucinda@epa.gov>, "Tomasovic, Brian" <Tomasovic.Brian@epa.gov>
Subject: TX BART and RP Goals One Pager

Following is the text of the attachment.

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Insured amount not over	Fee	Insured amount not over	Fee
$500	4.00		
$600	5.00		
$700	6.00		
$800	7.00	$2,499 max	$24.00.

Value Limit (*212.1*)

The maximum value of a GXG shipment to this country is $2,499 or a lesser amount if limited by content or value.

Size Limits (*211.22*)

The surface area of the address side of the item to be mailed must be large enough to completely contain the Global Express Guaranteed Air Waybill/Shipping Invoice (shipping label), postage, endorsement, and any applicable markings. The shipping label is approximately 5.5 inches high and 9.5 inches long.

Maximum length: 46 inches
Maximum width: 35 inches
Maximum height: 46 inches
Maximum length and girth combined: 108 inches

General Conditions for Mailing

See Publication 141, *Global Express Guaranteed Service Guide,* for information about areas served in the destination country, allowable contents, packaging and labeling requirements, tracking and tracing, service standards, and other conditions for mailing.

Express Mail International (*220*)

Not Available

Priority Mail International *(230)* Price Group 6

Refer to *Notice 123,* Price List, for the applicable retail, commercial base, or commercial plus price.
Weight Limit: 44 lbs.

Note: Ordinary Priority Mail International includes indemnity at no cost based on weight. (See *230.*)

Priority Mail International—Flat Rate

Flat Rate Envelopes or Small Flat Rate Priced Boxes: The maximum weight is 4 pounds. Refer to *Notice 123,* Price List, for the applicable retail, commercial base, or commercial plus price.

Flat Rate Boxes—Medium and Large: The maximum weight is 20 pounds, or the limit set by the individual country, whichever is less. Refer to *Notice 123,* Price List, for the retail, commercial base, or commercial plus price.

Insurance (*232.92*)

NOT Available

Size Limits (*231.22*)

Maximum length: 42 inches
Maximum length and girth combined: 79 inches

First-Class Mail International (*240*) Price Group 6

For the prices and maximum weights for letters, large envelopes (flats), packages (small packets), and postcards, see *Notice 123, Price List.*

Size Limits

Letters: See *241.212*
Postcards: See *241.221*
Large Envelopes (Flats): See *241.232*
Packages (Small Packets): See *241.242* and *241.243*

Airmail M-Bags (*260*)—

Direct Sack to One Addressee Price Group 6

Refer to *Notice 123,* Price List, for the applicable retail, commercial base, or commercial plus price.
Weight Limit: 66 lbs.

Matter for the Blind (*270*)

Free when sent as First-ClassMail International, including Priority Mail International Flat Rate Envelopes and Small Flat Rate Priced Boxes. Weight limit: 4 pounds.

Free when sent as Priority Mail International. Weight limit: 15 pounds.

Extra Services

Certificate of Mailing (*313*)

Individual Pieces	Fee
Individual article (PS Form 3817)	$1.15
Firm mailing books (PS Form 3877), per article listed (minimum 3)	0.44
Duplicate copy of PS Form 3817 or PS Form 3877 (per page) ...	1.15
Bulk Quantities	Fee
First 1,000 pieces (or fraction thereof)	6.70
Each additional 1,000 pieces (or fraction thereof)	0.80
Duplicate copy of PS Form 3606	1.15

COD and Certified

NOT for International Mail

International Business Reply Service (*382*)

Fee: Envelopes up to 2 ounces $1.50; Cards $1.00

International Postal Money Order (*371*)

NOT Available

International Reply Coupons (*381*)

Fee: $2.20

Registered Mail (*330*)

Fee: $11.75
Maximum Indemnity: $47.33
Available for First-ClassMail International, including postcards and Flat Rate Envelopes and Small Flat Rate Priced Boxes, and matter for the blind or other physically handicapped persons. Not applicable to M-bags.

Restricted Delivery (*350*)

Fee: $4.55
Available for Registered Mail with a return receipt.
Endorsements: A remettre en main propre.

Return Receipt (*340*)

Fee: $2.35
Available for Registered Mail only.

* * * * *

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–13637 Filed 6–6–12; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[EPA–HQ–OAR–2011–0729; FRL–9672–9]

RIN 2060–AR05

Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing revisions to our rules pertaining to the

regional haze program. In this action, the EPA is finalizing our finding that the trading programs in the Transport Rule, also known as the Cross-State Air Pollution Rule (CSAPR), achieve greater reasonable progress towards the national goal of achieving natural visibility conditions in Class I areas than source-specific Best Available Retrofit Technology (BART) in those states covered by the Transport Rule. In this action, the EPA is also finalizing a limited disapproval of the regional haze State Implementation Plans (SIPs) that have been submitted by Alabama, Georgia, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia and Texas because these states relied on requirements of the Clean Air Interstate Rule (CAIR) to satisfy certain regional haze requirements. To address deficiencies in CAIR-dependent regional haze SIPs, in this action the EPA is promulgating Federal Implementation Plans (FIPs) to replace reliance on CAIR with reliance on the Transport Rule in the regional haze SIPs of Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia.

DATES: This final rule is effective on August 6, 2012.

ADDRESSES: *Docket.* The EPA has established a docket for this action under docket ID No. EPA–HQ–OAR–2011–0729. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Ms. Martha Keating, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail code C539–04, Research Triangle Park, NC 27711, telephone (919) 541–9407; fax number: 919–541–0824; email address: *keating.martha@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action affects state and local air pollution control agencies located within the geographic areas covered by the Transport Rule [1] and whose regional haze SIP relied on CAIR [2] as an alternative to BART for sulfur dioxide (SO_2) and/or nitrogen oxide (NO_X) for electric generating units (EGUs) subject to BART requirements, or whose regional haze SIP relied on the Transport Rule. Some of the EGUs located in such geographic areas may also be affected by this action in that affected states now have the option of not requiring such EGUs to meet source-specific BART emission limits to which these EGUs otherwise could be subject.

These sources are in the following groups:

Industry group	SIC [a]	NAICS [b]
Electric Services	492	221111, 221112, 221113, 221119, 221121, 221122

[a] Standard Industrial Classification.
[b] North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this notice will be posted at *http://www.epa.gov/ttn/oarpg/new.html* under ''Recent Actions.''

C. How is this notice organized?

The information presented in this notice is organized as follows:

[1] *See* Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 76 FR 48208 (August 8, 2011).

[2] *See* Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call; Final Rule, 70 FR 25162 (May 12, 2005).

II. Background and General Legal Considerations for the EPA's Final Action

A. Background

Section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources built between 1962 and 1977 procure, install, and operate BART as determined by the state.[3] Under the Regional Haze Rule, states are directed to conduct BART determinations for such "BART-eligible"sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress towards improving visibility than BART. 40 CFR 51.308(e)(2). The EPA provided states with this flexibility in the Regional Haze Rule, adopted in 1999, and further refined the criteria for assessing whether an alternative program provides for greater reasonable progress in three subsequent rulemakings. 64 FR 35714 (July 1, 1999); 70 FR 39104 (July 6, 2005); 71 FR 60612 (October 13, 2006). These criteria are described below.

1. Criteria for Developing an Alternative Program to BART

Specific criteria for determining if an alternative measure achieves greater reasonable progress than source-specific BART are set out in the Regional Haze Rule at §51.308(e)(3).[4] The "better-than-BART" test may be satisfied as follows: If the distribution of emissions is not substantially different than under BART, and the alternative measure results in greater emission reductions, then the alternative measure may be deemed to achieve greater reasonable progress. If the distribution of emissions is significantly different, then states are directed to conduct an air quality modeling study to determine differences in visibility between BART and the alternative program for each impacted Class I area for the worst and best 20 percent of days.[5] A test with the following two criteria (the "two-pronged visibility test") would demonstrate "greater reasonable progress" under the alternative program if both prongs of the test are met:

—Visibility does not decline in any Class I area,[6] and
—There is an overall improvement in visibility, determined by comparing the average differences between BART and the alternative over all affected Class I areas.

2. What is the relationship between BART and CAIR?

In May 2005, the EPA published CAIR, which required 28 states and the District of Columbia to reduce emissions of SO_2 and NO_X that significantly contribute to, or interfere with maintenance of, the 1997 national ambient air quality standards (NAAQS) for fine particulates and/or ozone in any downwind state. The CAIR established emission budgets for SO_2 and NO_X for states that contribute significantly to nonattainment in downwind states and required the significantly contributing states to submit SIP revisions that implemented these budgets. Because such SIP revisions were already overdue, the EPA subsequently promulgated CAIR FIPs for the affected states establishing cap and trade programs for EGUs with opt-in provisions for other sources. States had the flexibility to subsequently adopt SIP revisions mirroring CAIR requirements or otherwise providing emission reductions sufficient to address emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in other states. Many affected states adopted CAIR-mirroringSIPs, while others chose to remain under CAIR FIPs.

As noted above, the Regional Haze Rule allows states to implement an alternative program in lieu of BART so long as the alternative program has been demonstrated to achieve greater reasonable progress toward the national visibility goal than would BART. The EPA made just such a demonstration for CAIR in revisions to the regional haze program made in 2005. 70 FR 39104. In those revisions, we amended our regulations to provide that states participating in the CAIR cap-and-trade programs under 40 CFR part 96 pursuant to an EPA-approvedCAIR SIP or states that remain subject to a CAIR FIP in 40 CFR part 97 need not require affected BART-eligibleEGUs to install, operate and maintain BART for emissions of SO_2 and NO_X. 40 CFR 51.308(e)(4).

As a result of our determination that CAIR was "better-than-BART,"a number of states in the CAIR region, fully consistent with our regulations, relied on the CAIR cap-and-trade programs as an alternative to BART for EGU emissions of SO_2 and NO_X in designing their regional haze implementation plans. These states also relied on CAIR as an element of a long-term strategy for achieving their reasonable progress goals for their regional haze programs.

3. Remand of CAIR and Implications for State Regional Haze Implementation Plans

Following our determination in 2005 that CAIR was "better-than-BART,"the D.C. Circuit Court ruled on several petitions for review challenging CAIR on various grounds. As a result of this litigation, the D.C. Circuit Court remanded CAIR to the EPA but later decided not to vacate the rule.[7] The court thereby left CAIR and CAIR FIPs in place in order to "temporarily preserve the environmental values covered by CAIR" until the EPA replaced it with a rule consistent with the court's opinion. 550 F.3d at 1178.

[3] The preamble to the proposed rule provides additional background on the visibility requirements of the Clean Air Act and the EPA's Regional Haze Rule. 76 FR 82221–22.

[4] The Regional Haze Rule also allows for a demonstration that an alternative program provides for greater reasonable progress to be based on the clear weight of evidence. 40 CFR 51.308(e)(2)(E). We concluded that a more general test may be appropriate in certain circumstances, such as where, for example, technical or data limitations limit the ability of a state (or the EPA) to undertake a robust comparison using the test set out in 40 CFR 51.308(e)(3).

[5] While the Regional Haze Rule directs the state to conduct the air quality modeling study, as described in section III.C.2, the EPA itself conducted such a study for CAIR and through a notice-and-commentrulemaking codified the conclusion that the stated criteria were met by adding specific provisions allowing the use of CAIR in lieu of source-specificBART. We have now done the same for the Transport Rule.

[6] The "decline" is relative to modeled future baseline visibility conditions in the absence of any BART or alternative program control requirements.

[7] *See North Carolina* v. *EPA*, 531 F.3d 896; modified by 550 F.3d 1176 (D.C. Cir. 2008).

On August 8, 2011, EPA promulgated the Transport Rule, which was to replace CAIR.[8] As promulgated, the Transport Rule would have addressed emissions in 2012 and later years and would have left the requirements of CAIR and the CAIR FIPs in place to address emissions through the end of 2011. The D.C. Circuit, however, on December 30, 2011, stayed the Transport Rule (including the provisions that would have sunset CAIR and the CAIR FIPs) and instructed the EPA to continue to administer CAIR pending the outcome of the court's decision on the petitions for review challenging the Transport Rule. *EME Homer City* v. *EPA,* No. 11–1302 (Order).

Many states relied on CAIR as an alternative to BART for SO_2 and NO_X for subject EGUs, as allowed under the then-current BART provisions at 40 CFR 51.308(e)(4). These states also relied on the improvement in visibility expected to result from controls planned or already installed on sources in order to meet CAIR provisions in developing their long-term visibility strategy. In addition, many states relied upon their own CAIR SIPs or the CAIR FIPs for their states as legal justification for these planned controls and consequently did not include separate enforceable measures in their long-term strategies (a required element of a regional haze SIP submission) to ensure these EGU reductions. These states also submitted demonstrations showing that no additional controls on EGUs beyond CAIR would be reasonable for the first 10-year implementation period of the regional haze program.

In summary, many of the states in the CAIR-affected region have based a number of required elements of their regional haze programs on CAIR. However, as CAIR has been remanded and only remains in place temporarily, we cannot fully approve these regional haze SIP revisions that have relied on the now-temporary reductions from CAIR. Although CAIR is currently in effect as a result of the December 30, 2011 Order by the U.S. Court of Appeals for the D.C. Circuit staying the Transport Rule, this does not affect the substance of the D.C. Circuit's ruling in 2008 remanding CAIR to the EPA.

4. The Transport Rule and Regional Haze SIPs

The Transport Rule as promulgated would establish Transport Rule trading programs to replace the CAIR trading programs and would sunset the requirements of CAIR and the CAIR FIPs. The Transport Rule, as promulgated, requires 28 states in the eastern half of the United States to significantly improve air quality by reducing EGU SO_2 and NO_X emissions that cross state lines and significantly contribute to ground-level ozone and/or fine particle pollution in other states. The rule allows allowance trading among covered sources, utilizing an allowance market infrastructure modeled after existing allowance trading programs. The Transport Rule allows sources to trade emissions allowances with other sources within the same program (*e.g.,* ozone season NO_X) in the same or different states, while firmly constraining any emissions shifting that may occur by establishing an emission ceiling for each state.

In our proposal, we described a technical analysis that we conducted to determine whether compliance with the Transport Rule would satisfy regional haze BART-related requirements. This technical analysis is the basis of this final action in which we are finalizing our determination that the Transport Rule achieves greater reasonable progress towards the national goal of achieving natural visibility conditions than source-specific BART. For this final rule, an updated sensitivity analysis was conducted to account for subsequent revisions to certain state budgets in the Transport Rule. This analysis is described in section III.B.4 of this notice.

B. Summary of the EPA Response to General and Legal Issues Raised in Public Comments

The EPA has based its determination that the Transport Rule will achieve greater reasonable progress than BART on the approach used by the EPA in evaluating whether a similar program, CAIR, would satisfy the regional haze BART-related requirements. As noted above, the Regional Haze Rule, promulgated in 1999, provides states with the flexibility to adopt an emissions trading program rather than requiring source-by-source BART. 40 CFR 51.308(e)(2). Some commenters supported our general approach and agreed that the Transport Rule will provide for greater reasonable progress. Other commenters, however, disagreed with our conclusion that the Transport Rule can be used as an alternative to BART. These commenters argued that we lack authority to make such a determination and that we cannot rely on the Transport Rule because of the current stay of that rule, and that the Transport Rule does not meet the necessary regulatory requirements for an alternative program in lieu of BART. Some commenters argued that we could not conclude that the Transport Rule provides for greater reasonable progress without considering each state's reasonable progress goals. Other commenters took the position that we should fully approve the regional haze SIPs that relied on CAIR to satisfy certain regional haze requirements and that our proposed limited disapproval of the regional haze SIPs was unnecessary.

1. Authority for an Alternative Trading Program

As described above, in 2005 (70 FR 39104) the EPA amended its Regional Haze Rule to provide that states participating in the CAIR cap-and-trade programs need not require affected BART-eligible EGUs to install, operate and maintain BART for emissions of SO_2 and NO_X. 40 CFR 51.308(e)(4). As EPA noted in explaining its reasons for adopting this approach, ''[nothing] in the CAA or relevant case law prohibits a State from considering emissions reductions required to meet other CAA requirements when determining whether source-by-source BART controls are necessary to make reasonable progress. Whatever the origin of the emission reduction requirement, the relevant question for BART purposes is whether the alternative program makes greater reasonable progress.'' 70 FR at 39143.

The EPA's authority to establish non-BART alternatives in the regional haze program and the specific methodology outlined above for assessing such alternatives have been previously challenged and upheld by the D.C. Circuit. In the first case challenging the provisions in the Regional Haze Rule allowing for states to adopt alternative programs in lieu of BART, the court affirmed our interpretation of CAA section 169A(b)(2) as allowing for alternatives to BART where those alternatives will result in greater reasonable progress than BART. *Center for Energy and Economic Development* v. *EPA,* 398 F.3d 653, 660 (D.C. Cir. 2005) (''*CEED*'') (finding reasonable the EPA's interpretation of CAA section 169(a)(2) as requiring BART only as necessary to make reasonable progress). In the second case, *Utility Air Regulatory Group* v. *EPA,* 471 F.3d 1333 (D.C. Cir. 2006) (''*UARG*''), the court specifically upheld our determination that states could rely on CAIR as an alternative program to BART for EGUs in the CAIR-affected states. The court concluded that the EPA's two-pronged test for determining whether an alternative program achieves greater

[8] *See* Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone. 76 FR 48208.

reasonable progress was a reasonable one and also agreed with EPA that nothing in the CAA required the EPA to ''impose a separate technology mandate for sources whose emissions affect Class I areas, rather than piggy-backingon solutions devised under other statutory categories, where such solutions meet the statutory requirements.'' *Id.* at 1340.

Notwithstanding the decisions of the D.C. Circuit, several commenters argued that the plain language of the CAA precludes the EPA from allowing an alternative to BART. In their comments, these groups claimed that there is no statutory authority to exempt a source from BART, except as provided for in CAA section 169A(c). Under the interpretation of the CAA urged by these commenters, BART must be required at each BART source that causes or contributes to visibility impairment at any Class I area. The commenters point to recent decisions post-dating*CEED* and *UARG* in support of their arguments.

The commenters' arguments that the plain language of the CAA precludes reliance on the Transport Rule to satisfy the BART requirements were raised in *UARG* v. *EPA* and rejected by the D.C. Circuit when it denied the petitions for review of the EPA's determination that CAIR provided for greater reasonable progress than BART. While the commenter argues that the court's decision ''has been undermined by subsequent D.C. Circuit decisions,'' we disagree. The decisions cited by the commenter, *North Carolina* v. *EPA,* 531 F.3d 896, 906–08 (D.C. Cir. 2008) and *NRDC* v. *EPA,* 571 F.3d 1245, 1255–58 (D.C. Cir. 2009) address the requirements of sections 110(a)(2)(D)(i)(I) and 172(c)(1), respectively. Given the differences between the language of these statutory provisions and that of section 169A(b)(2), the courts' interpretation of these other provisions of the CAA do not undermine the two previous rulings of the D.C. Circuit interpreting the visibility provisions of the Act. Similarly, the Supreme Court's conclusions in *Massachusetts* v. *EPA,* 549 U.S. 497, 528–29 (2007) regarding the meanings of ''each'' and ''any'' do not conflict with or impact the EPA's reading of section 169A(b)(2) of the CAA or the D.C. Circuit's conclusion that the agency's interpretation of the statute is a reasonable one. As the *CEED* court explained, the EPA interprets this provision to mean that ''each SIP's 'emission limits, schedules of compliance, and other measures' must 'include' BART only 'as may be necessary to make reasonable progress toward' national visibility goals.'' 398 F.3d 653, *quoting* 42 U.S.C. 7491(b)(2); *see also Central Arizona Water Conservation District* v. *EPA,* 990 F.2d 1531, 1543 (9th Cir. 1993) (upholding the same interpretation of section 169A(b)(2)). We do not agree, therefore, that the EPA's regulations allowing for the adoption of a trading program that provides for greater reasonable progress than BART in place of source-specific BART are inconsistent with the CAA.

These commenters also argue that the EPA can exempt sources from BART only if the EPA complies with the requirements of CAA section 169A(c)(1). This provision of the CAA allows the EPA to exempt a source from the BART requirements, by rule, upon a determination that the source is not reasonably anticipated to cause or contribute to significant visibility impairment. As the commenters note, the appropriate Federal Land Manager(s) must agree with the exemption before it can go into effect.

We do not agree that the provisions governing exemptions to BART apply to our determination that the Transport Rule will make greater reasonable progress than BART. Section 169A(b)(2) of the CAA requires each visibility SIP to contain ''such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward the national goal * * * including * * * a requirement that [certain major stationary sources] * * * procure, install, and operate * * * [BART].'' Based on this language, in 1999, the EPA concluded that if an alternative program can be shown to make greater reasonable progress toward eliminating or reducing visibility impairment, then installing BART for the purpose of making reasonable progress toward the national goal is no longer necessary. This interpretation of the visibility provisions of the CAA has been upheld three times by the courts, as noted above.

We also received comments arguing that the EPA cannot rely on the Transport Rule as an alternative to BART because the emission reductions do not meet the requirement of 40 CFR 51.308(e)(2)(iv) which provides that ''the emission reductions resulting from the emissions trading program * * * will be surplus to those reductions resulting from measures adopted to meet requirements of the CAA as of the baseline date of the SIP.''

We do not agree with the comments that the emissions reductions resulting from the Transport Rule must be ''surplus to those measures adopted to meet requirements of the CAA as of the baseline date of the SIP.'' We note that the requirements of 40 CFR 51.308(e)(2) are not directly applicable to this action, as the special provisions in the Regional Haze Rule addressing the Transport Rule are codified at 40 CFR 51.308(e)(4). Nonetheless, our determination that the Transport Rule will result in greater visibility improvement than BART is fully consistent with the requirement in 40 CFR 51.308(e)(2)(iv). In promulgating the Regional Haze Rule in 1999, the EPA explained that the ''baseline date of the SIP'' in this context means ''the date of the emissions inventories on which the SIP relies,'' 64 FR 35742, which is ''defined as 2002 for regional haze purposes,'' 70 FR 39143. Any measure adopted after 2002 is accordingly ''surplus'' under 40 CFR 51.308(e)(2)(iv). This is consistent with the discussion in the preamble to the 1999 Regional Haze Rule indicating that the regional haze program ''is being promulgated in a manner that facilitates integration of emission management strategies for regional haze with the implementation of programs for [the 1997 ozone and $PM_{2.5}$] NAAQS.'' 64 FR 35719. The EPA took this approach in the Regional Haze Rule to allow measures needed to attain the then new NAAQS to be ''counted'' as making ''reasonable progress'' toward the visibility goal. The Transport Rule was adopted to help areas come into attainment with and maintain the 1997 ozone and PM NAAQS, as well as the 2006 24-hour$PM_{2.5}$ NAAQS. The EPA accordingly does not view the requirement in 40 CFR 51.308(e)(2)(iv) as limiting our ability to demonstrate that the Transport Rule reductions are surplus, as defined in the Regional Haze Rule.

2. Effect of the Transport Rule Stay

Several commenters contended that the EPA cannot rely on the Transport Rule as a BART alternative because implementation of the rule has been stayed. These commenters argue that an alternative program in place of BART must constitute a ''requirement,'' and be enforceable, and that as long as the Transport Rule is stayed, it cannot qualify as a ''requirement'' nor can it be enforced. These commenters also claim that because the rule may change if affirmed only in part, the EPA cannot find that the Transport Rule will make greater reasonable progress than BART.

We do not agree that the EPA cannot rely on the Transport Rule because of the stay imposed by the D.C. Circuit. We base this conclusion on both the structure of 40 CFR 51.308(e)(4) and on the long-termfocus of our analysis underlying today's rule.

Neither our regulations in 2005 addressing CAIR, nor our regulations in this rule addressing the Transport Rule, require states to participate in or implement these programs or to otherwise include enforceable measures in their *regional haze* SIPs. In 2005, having determined that CAIR would provide for greater reasonable progress toward the national goal than would BART, the EPA promulgated regulations providing that a state participating in one of the CAIR trading programs ''need not require'' EGUs to put on BART controls. Similarly, our regulations in this rule provide that a state subject to a Transport Rule FIP (or approved Transport Rule SIP) need not require BART controls on its EGUs. Accordingly, today's regulations addressing the Transport Rule are not ''requirements'' that a state participate in the interstate transport trading programs. Similarly, a *regional haze* SIP or FIP that relies on 40 CFR 51.308(e)(4) does not impose enforceable requirements on EGUs. However, a state may take advantage of this provision only if it is subject to an underlying Transport Rule FIP (or SIP approved as meeting the requirements of the trading program). We note that the underlying Transport Rule FIP or SIP does contain the applicable requirements that will ensure that the emissions reductions from the Transport Rule will occur.

We also note that while the Transport Rule is not currently enforceable, the air quality modeling analysis underlying our determination that the Transport Rule will provide for greater reasonable progress than BART is based on a forward-lookingprojection of emissions in 2014. However, any year up until 2018 (the end of the first regional haze planning period) would have been an acceptable basis for comparing the two programs under the Regional Haze Rule. *See* 40 CFR 51.308(e)(2)(iii). We anticipate that requirements addressing all significant contribution and interference with maintenance identified in the Transport Rule will be implemented prior to 2018.

We do not agree with the comment that because the Transport Rule is subject to review by the D.C. Circuit, we cannot move ahead with our determination that it provides for greater reasonable progress than BART. We do not view the stay imposed by the D.C. Circuit pending review of the underlying rule as undermining our conclusion that the Transport Rule will have a greater overall positive impact on visibility than BART both during the period of the first long-termstrategy for regional haze and going forward into the future. We recognize, as one commenter suggests, that we may be obliged to revisit the regional haze plans that rely on the Transport Rule if the rule is not upheld, or if it is remanded and subsequently revised. However, we do not consider it appropriate to await the outcome of the D.C. Circuit's decision on the Transport Rule before moving forward with the regional haze program as we believe the Transport Rule has a strong legal basis, and given the judicial decree requiring the EPA to meet its statutory obligations to have a FIP or an approved SIP meeting the Regional Haze Rule requirements in place for most states before the end of 2012.

3. Rationale for Disapproval of SIPs Based on CAIR

We received comments that our proposed limited disapproval of the regional haze SIPs that rely on CAIR and the proposed FIPs is not necessary. Commenters noted that CAIR remains in place and that SIPs that rely on CAIR are fully consistent with our existing regulations. Some commenters suggested that we revise the Regional Haze Rule to allow states to rely on either CAIR or the Transport Rule to meet the BART requirements.

While the regional haze program is a long-termprogram that requires states to submit SIPs every 10 years to assure continued reasonable progress toward natural background conditions, the BART requirements or alternatives to BART must be fully implemented by 2018. The required establishment of BART limits, or an alternative to BART, is accordingly undertaken only once. Although CAIR is currently in place as a result of the D.C. Circuit's stay of the Transport Rule, we do not anticipate that CAIR will continue in effect indefinitely. As a result, our determination that CAIR provides for greater reasonable progress than BART is no longer valid. This is because, as a general matter, any source required to install BART controls must maintain the BART control equipment and meet the BART emission limit established in the SIP so long as the source continues to operate. *See* 40 CFR 51.308(e). As BART would result in emission reductions going forward beyond 2018, our determination that CAIR provides for greater reasonable progress than BART was based on the assumption that the reductions required by CAIR would be enforceable requirements that would also apply going forward to 2018 and beyond. That assumption is no longer appropriate. We are issuing a limited disapproval rather than a full disapproval, however, to allow the states to rely on the emission reductions from CAIR for so long as CAIR is in place.

4. The Relationship Between a Better-Than-BARTDetermination and Reasonable Progress

Each state with a Class I area is required to set goals for each Class I area that provide for reasonable progress towards improving visibility. There must be one goal for the 20 percent best visibility days and one goal for the 20 percent worst visibility days. States take into account a number of factors in establishing reasonable progress targets, including in some cases an analysis of the measures needed to achieve the ''uniform rate of progress'' [9] over the 10-year period of the SIP and a determination of the reasonableness of such measures. 40 CFR 51.308(d)(1). The Regional Haze Rule does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for ''reasonable progress'' toward achieving natural background conditions.

Several commenters argued that our determination that the Transport Rule provides for greater reasonable progress than BART is improper because it considers BART in isolation, without reference to the consideration of the reasonable progress goals in the regional haze plans. These commenters contend that BART is critical to the state's ability to reach its reasonable progress goals and that the EPA should have considered the impact of our proposed determination in instances where the states relied on emissions reductions consistent with presumptive BART to meet reasonable progress goals.

The EPA disagrees with the argument that we cannot compare the visibility improvements from Transport Rule against those from BART without considering the reasonable progress goals of each affected regional haze SIP. BART is one measure for addressing visibility impairment, but it is not ''the mandatory vehicle of choice.'' CEED, 398 F.3d at 660. As such, BART is not a required element of the regional haze SIPs so long as an appropriate alternative achieves greater reasonable progress.

The commenters' suggestion that reasonable progress goals are defined and that each regional haze SIP must accordingly ensure a certain rate of progress toward natural visibility also mischaracterizes the regional haze program. As noted above, the reasonable

[9] For each Class I area, the uniform rate of progress is based on the calculation of the steady rate of improvement in visibility needed to achieve natural background conditions by 2064.

progress goals for each Class I area are set by the states. States, both in and out of the CAIR region, set their reasonable progress goals based, in part, on anticipated reductions in emissions due to CAIR. In setting reasonable progress goals, these states estimated future emissions in 2018 from a number of sources and source categories, including emissions from EGUs. For sources in the CAIR region, states relied on emissions reductions from CAIR—not BART—to estimate future EGU emissions. As a result, source-specificBART across the CAIR region is clearly not critical to the states' ability to meet the goals in their SIPs. For the small handful of states that were not subject to CAIR but are now subject to the Transport Rule, today's determination that the Transport Rule provides for greater reasonable progress than BART gives those states the opportunity to consider revising their regional haze SIPs to substitute participation in the Transport Rule for source-specificBART. Whether such a revision meets the requirements of the Regional Haze Rule, including the requirement that a plan include such measures as may be necessary to make reasonable progress toward the national goal, would be addressed in a notice and comment rulemaking that would provide an opportunity for review of the adequacy of such an approach. We disagree with the commenters' statement, however, that source-specific BART as a general matter is necessary to ensure reasonable progress.

III. Technical Analysis Supporting the Determination of the Transport Rule as an Alternative to BART

A. What analysis did we rely on for our proposed determination?

The technical analysis that the EPA relied on for our proposed and now final determination that the Transport Rule is better than BART is described in detail in the preamble of the proposed rule and in the Technical Support Document (TSD).[10] To provide context for the summary of the public comments and our responses to them, we are providing a summary of the technical analysis in the following sections.

1. Application of the Two-ProngedTest

The two-prongedtest for determining if an alternative program achieves greater reasonable progress than source-specific BART is set out in the Regional Haze Rule at 40 CFR 51.308(e)(3). The underlying purpose of both prongs of the test is to assess whether visibility at Class I areas would be better with the alternative program in place than without it. Under the first prong, visibility must not decline at any affected Class I area on either the best 20 percent or the worst 20 percent days as a result of implementing the Transport Rule; and, under the second prong the 20 percent best and 20 percent worst days should be considered in determining whether the alternative program under consideration (in the case of this rulemaking, the Transport Rule) produces greater average improvement than source-specific BART over all affected Class I areas. Together, these tests ensure that the alternative program provides for greater reasonable progress than would source-specificBART.

In applying the two-prongedtest to the Transport Rule control scenario and the source-specificBART control scenario, we used a future (2014) projected baseline. The 2014 baseline does not include the Transport Rule, BART, or CAIR control programs. As described in the preamble to the proposed rule, the 2014 baseline allows a comparison of visibility conditions as they are expected to be at the time of the program implementation, but in the absence of the program. This ensures that the visibility improvement or possible degradation is due to the programs being compared—source-specific BART and the Transport Rule alternative—and not to other extrinsic factors. Also, under the Regional Haze Rule any program adopted after 2002 is considered ''surplus'' and eligible to be counted as all or part of an alternative program in place of BART.

2. Identification of Affected Class I Areas

As described above, under the second prong of the test, the visibility comparison is over all ''affected'' Class I areas. The EPA added the term ''affected'' to clarify that visibility need not be evaluated nationwide. 71 FR 60620. We considered two approaches to identify the Class I areas ''affected'' by the Transport Rule as an alternative control program to source-specific BART. First, we identified 140 Class I areas represented by 96 Interagency Monitoring of Protected Visual Environments (IMPROVE) monitors in the 48 contiguous states with sufficiently complete monitoring data available to support the analysis. In the first ''eastern'' approach, we identified as affected Class I areas the 60 Class I areas contained in the eastern portion of the Transport Rule modeling domain. The second approach we considered was a ''national'' approach in which visibility impacts on 140 Class I areas across the 48 contiguous states were evaluated (including the 60 contained within the Transport Rule region). Consideration of this national region accounted for the possibility that the Transport Rule might have the effect of increasing EGU emissions in the most western portion of the United States due to shifts in electricity generation or other market effects. We noted that the ''eastern'' Transport Rule modeling grid used a horizontal resolution of 12 km (all 60 ''eastern'' Class I areas were contained within the 12 km grid). The modeling grid for areas outside of the eastern Transport Rule region used a more coarse horizontal resolution of 36 km.

We requested comment on whether the ''affected Class I areas'' should be considered to be the 60 Class I areas located in the Transport Rule eastern modeling domain, the larger set of 140 Class I areas in the larger national domain, or some other set. We noted that given the modeling results, the choice between the 60 Class I areas or the 140 Class I areas did not affect our proposed conclusion that both prongs of the two-prongedtest are met.

3. Control Scenarios Examined

The Transport Rule requires 28 states in the eastern half of the United States to reduce EGU SO_2 and NO_X emissions that cross state lines and contribute to ground-levelozone and fine particle pollution in other states. BART, on the other hand, is applicable nationwide and covers 26 industrial categories, including EGUs, of a certain vintage. In our comparison, we sought to determine whether the Transport Rule cap-and-trade program for EGUs will achieve greater reasonable progress than would BART for EGUs only. Therefore, we examined two relevant control scenarios. The first control scenario examined SO_2 and NO_X emissions from all EGUs nationwide after the application of BART controls to all BART-eligibleEGUs (''Nationwide BART''). In the second scenario, EGU SO_2 and NO_X emissions reductions attributable to the Transport Rule were applied in the Transport Rule region and BART controls were applied to all BART-eligibleEGUS outside the Transport Rule region (''Transport Rule + BART elsewhere''). For the first prong of the test, the ''Transport Rule + BART elsewhere'' scenario was compared to the 2014 future year base case. The comparison to the 2014 future year ''Base Case'' allows the EPA to ensure that the Transport Rule would not cause degradation in visibility from conditions predicted for the year 2014 in the

[10] Technical Support Document for Demonstration of the Transport Rule as a BART Alternative, Docket EPA–HQ–OAR–2011–0729.

absence of the Transport Rule, BART and CAIR.

For both the ''Nationwide BART'' scenario and the ''Transport Rule + BART elsewhere'' scenario, we modeled the presumptive EGU BART limits for SO_2 and NO_X emission rates as specified in the BART Guidelines (Guidelines for BART Determinations Under the Regional Haze Rule, 70 FR 39104, July 6, 2005), unless an actual emission rate at a given unit with existing controls is lower. In the latter case, we modeled the lower emission rates. Our analysis assumed that all BART-eligibleEGUs were actually subject to BART requirements and that presumptive BART limits would be applied to 100 megawatt (MW) EGUs for SO_2 and 25 MW EGUs for NO_X, regardless of the magnitude of their annual total emissions. In our analysis, in both scenarios we constrained certain EGUs by emission limits other than presumptive limits due to a proposed or final regional haze SIP, a proposed or final regional haze FIP, a final consent decree, or state rules. Where we had evidence of more stringent emission limits than the presumptive BART limits, we used them. These units and their emission limits are detailed in the TSD.

There are five states that are subject to the Transport Rule requirements during the ozone season only (Oklahoma, Arkansas, Louisiana, Mississippi and Florida). For these states, in the ''Transport Rule + BART elsewhere'' scenario post-combustion NO_X controls were assumed to operate outside of the ozone season only when required to do so for a reason other than Transport Rule requirements, *e.g.,* a permit condition or a provision of a consent decree. In the ''National BART'' scenario, BART NO_X controls were assumed to operate year-round.

4. Emission Projections

To estimate emissions expected from the scenarios described in section IV, we used the Integrated Planning Model (IPM).[11] The IPM was used in this case to evaluate the emissions impacts of the described scenarios limiting the emissions of SO_2 and NO_X from EGUs. The IPM projections of annual NO_X and SO_2 emissions from EGUs for the ''Transport Rule + BART elsewhere'' control scenario were used as inputs to the air quality model to assess the visibility impacts of the emission changes. The IPM projections were based on the state budgets prescribed in the final Transport Rule published on August 8, 2011, and the supplemental proposal published on July 11, 2011.[12] We noted that on October 14, 2011, the EPA issued a proposed notice that would increase NO_X and SO_2 budgets for certain states in accordance with revisions to certain unit-levelinput data. 76 FR 63860. We requested comment on the potential effect of the proposed increases to state budgets. We noted that even with the proposed increases to certain state budgets, we believed that the two-prongedtest is satisfied given the still-substantial reductions in emissions under the Transport Rule.

5. Air Quality Modeling Results

To assess the air quality metrics that are part of the two-prongedtest, we used the IPM emission projections as inputs, to an air quality model to determine the impact of ''Transport Rule + BART elsewhere'' and ''Nationwide BART'' controls on visibility in the affected Class I areas. To project air quality impacts we used the Comprehensive Air Quality Model with Extension (CAMx) version 5.3. The air quality modeling analysis and related analyses to project visibility improvement are described in more detail in the TSD for the Transport Rule.[13] The visibility projections for each Class I area are presented in the TSD for our proposed action.

We proposed that the ''Transport Rule + BART elsewhere'' control scenario passed the first prong of the visibility test considering affected Class I areas located in both the ''eastern'' region of 60 Class I areas and the ''national'' region of 140 Class I areas We also proposed our determination that the ''Transport Rule + BART elsewhere'' alternative measure passed the second prong of the test that assesses whether the alternative results in greater average visibility improvement at affected Class I areas compared to the ''Nationwide BART'' scenario. The ''Transport Rule + BART elsewhere'' alternative passed the second prong of the test, regardless of which way affected Class I areas are identified.

B. Summary of the EPA Responses to Comments on the Technical Analysis

Many comments supported the EPA's technical analysis and our determination that the Transport Rule satisfies the requirements for an alternative to source-specificBART. Other commenters raised objections to the EPA's determination. Some of these were general legal objections related to the EPA's legal authority for its action and its interpretation of authorizing regulations and statutes. The EPA's response to those general legal objections is discussed above in section III.A. Other objections raised technical issues related to the EPA's emissions and air quality modeling scenarios that were used to compare the results of the Transport Rule control scenario with the source-specificBART control scenario. In this section of the preamble we provide an overview of the EPA's review of these technical comments. Our responses are discussed in detail in the Response to Comments document, which is included in the docket for this rulemaking.

1. Comments Related to the Emissions Scenarios Used in the EPA's Analysis

As noted above, the EPA developed two emissions scenarios: A 2014 ''Nationwide BART'' scenario and a 2014 ''Transport Rule + BART elsewhere'' scenario. Nationwide emissions were substantially lower under the ''Transport Rule + BART elsewhere'' scenario. Some commenters asserted that the emissions results for these two scenarios were skewed in favor of the Transport Rule. These commenters asserted that the EPA underestimated the emissions reductions from BART, and overestimated the emission reductions from the Transport Rule. These commenters raise issues generally with the use of presumptive BART limits in the ''Nationwide BART'' scenario and questioned whether the EPA correctly applied the presumptive BART limits.

The EPA disagrees with commenters asserting that the presumptive BART limits were inappropriate for use in this analysis. While the EPA recognizes that a case-by-caseBART analysis may, in some source-specificassessments, result in emission limits more stringent than the presumptive limits, these limits are reasonable and appropriate for use in assessing regional emissions reductions from the BART scenario. This has been the EPA position since 2005. 71 FR 60619 (''the presumptions represent a reasonable estimate of a stringent case BART * * * because * * * they would be applied across the board to a wide

[11] Extensive documentation of the IPM platform may be found at *http://www.epa.gov/airmarkets/progsregs/epa-ipm/transport.html.*

[12] *See* Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone 76 FR 48208 (August 8, 2011). The ozone season state budgets for the states affected by the supplemental proposal published on July 11, 2001 (76 FR 40662) are included in the ''Transport Rule + BART elsewhere'' control scenario.

[13] *See* Air Quality Modeling Final Rule Technical Support Document, U.S. EPA, June 2011, which is found at: *http://www.epa.gov/airtransport/pdfs/AQModeling.pdf.*

variety of units with varying impacts on visibility, at power plants of varying size and distance from Class I areas''). Moreover, as discussed in detail in the Response to Comment document, the EPA believes that these comments overestimate the emissions reductions that would be associated with case-by-case BART because the commenters' assertions of ''best'' technology for BART ignore other factors, including cost of control and resulting visibility improvement, that are critical components of a source-specific BART analysis.

The EPA also received numerous comments concerning specific units for which the commenters believed the BART limits for SO_2 had been incorrectly applied in IPM. Our review of these comments, which is presented in detail in the Response to Comments document, shows that (with minor exceptions) the EPA correctly applied these presumptive limits. After reviewing these comments and the IPM outputs, we conclude that many of these comments stemmed from an apparent misunderstanding of the EPA's application of the presumptive limits in IPM. Some of the unit-level comments pertained to units less than 100 MW for which the presumptive limits did not apply. Other comments pertained to units that did not meet both the 95 percent removal efficiency and the 0.15 lb/MMBtu rate. For BART-affected units greater than or equal to 100 MW, the EPA's IPM modeling required that they meet a SO_2 emission rate limit of 0.15 lbs/MMBtu *or* a removal efficiency of 95 percent. As sources are only required to comply with one of these metrics (emission rate or percent removal), the IPM correctly determined that some BART sources could comply with an emission rate higher than 0.15 lb/MMBtu (while meeting the 95 percent FGD removal efficiency requirement) and some could comply with a removal efficiency less than 95 percent (while meeting the emission rate requirement).

The EPA also disagrees with the commenters' assertion that our application of presumptive limits for NO_X should have provided for the installation of add-on equipment such as selective catalytic reduction (SCR). For all types of boilers other than cyclone units, the presumptive NO_X limits in the EPA's BART guidelines are based only on the use of current combustion control technology including low NO_X burners, over-fire air, and coal reburning.[14] 70 FR 39134.

Finally, the EPA disagrees with commenters who expressed concerns that the ''no-CAIR'' base case was inappropriate for use in this analysis. The EPA agrees with commenters' observation that the 2014 base case leads to emission increases relative to current emissions. However, as explained in detail in the preamble to the final Transport Rule, the EPA believes this is a reasonable and appropriate case to use for estimating emissions reductions that are attributable to the Transport Rule, and for estimating air quality concentrations in absence of the Transport Rule. 76 FR 48223.

2. Identification of Affected Class I Areas

Under the Regional Haze Rule, the reasonable progress achieved by an alternative program in ''affected Class I areas'' is compared to the reasonable progress achieved by source-specific BART. In our proposal, the EPA requested comment on whether the ''affected Class I areas'' should be considered to be (1) The 60 Class I areas located in the Transport Rule eastern modeling domain, (2) the larger set of 140 Class I areas, or (3) some other set. We noted that our air quality modeling results showed that the choice between the 60 Class I areas or the 140 Class I areas did not affect our proposed conclusion that both prongs of the two-pronged test are met.

Some commenters agreed that the EPA can properly rely on an assessment of the 60 Class I areas without referring to the results of the additional 80 Class I areas. These commenters noted, as did the EPA, that because both assessment approaches support the Transport Rule as a lawful and reasonable BART alternative, the EPA may appropriately confirm its determination based on either approach. Other commenters argued that the EPA improperly averaged across all Class I areas. These commenters argued that both the 60 Class I area region and the 140 Class I area region are too broad. These commenters presented information illustrating the ''Nationwide BART'' scenario to be superior to the Transport Rule alternative if the EPA averaged visibility improvement at the 27 Class I areas west of the Mississippi River but east of the Rocky Mountains. These commenters asserted that the EPA should not average across states, but rather should assume Transport Rule changes in one state at a time, and average the results for areas in (and nearby) that state.

The EPA agrees with comments supporting our approach to identifying the ''affected'' Class I areas. The EPA agrees that in either case, the analysis shows that the two-pronged test for determining a BART alternative is satisfied. The EPA does not agree that it is necessary to evaluate results for a sub-region such as the 27 Class I areas suggested by some commenters. Given that the Transport Rule affects emissions and air quality over a large region, the EPA believes it is reasonable to consider that entire region in evaluating the Class I areas that are also ''affected'' by this rule. The possibility of greater visibility improvement due to source-specific BART in specific Class I areas within the region of ''affected Class I areas'' is inherent to the two-pronged test that has been upheld by the D.C. Circuit Court. As long as the average visibility improves over the *entire* region and no Class I area experiences degradation, the alternative is an appropriate and approvable alternative to source-specific BART. *See* 471 F.3d 1333 (D.C. Cir. 2006) (''*UARG*'') (''nothing in §169A(b)'s 'reasonable progress' language requires as least as much improvement in each and every individual area as BART itself would achieve'').

3. Ozone Season-Only Transport Rule States

Some commenters noted that five states—Arkansas, Florida, Louisiana, Mississippi and Oklahoma—are covered by the Transport Rule ozone season only, and thus these states are only required to hold allowances and limit statewide NO_X emissions during May through September. Commenters expressed concerns that while imposition of BART would require year-round operation of NO_X controls, under the Transport Rule there would be no assurance that NO_X emission controls would operate during the remaining 7 months of the year. Accordingly, the commenters asserted that for these states the Transport Rule is not ''better than BART'' because it would allow for a potential degradation during these months, and thus the EPA should consider the Transport Rule to fail the first prong of the two-pronged test.

The EPA carefully considered this comment, and we reviewed the results of our technical analysis to evaluate whether such seasonal differences could occur. For programs which regulate ozone season NO_X only, seasonal differences in the emissions rate (lb/

[14] The EPA notes that a BART determination made under the regional haze program is distinct from a best available control technology (BACT) determination made under the prevention of significant deterioration (PSD) program. 42 U.S.C. 7475. The fact that a control technology has been determined to be BART does not mean that the same controls would be found to meet the requirements for BACT.

MMBtu) can be seen where a source installs post-combustion controls such as selective catalytic reduction (SCR) or selective non-catalytic reduction (SNCR). It is probable that source owners would not operate the controls in non-ozone season months to avoid the extra cost of control. These effects are indeed seen in the data reported to the EPA. However, where a program results in the imposition of combustion controls such as low-NO_X burners and overfire air, the controls are an integral part of the operational design of the EGU. Accordingly, where combustion controls are installed in response to an ozone season-only requirement, the EPA does not expect to see seasonal differences in the lb/MMBtu NO_X emission rate.

Our review of the IPM predictions of how EGUs are likely to comply with the Transport Rule indicated that in the ''Transport Rule + BART elsewhere'' scenario, NO_X control in the five ozone season-only states is achieved predominantly by combustion controls rather than post-combustion controls. In the Transport Rule scenario, for four of the five states (Arkansas, Louisiana, Mississippi and Oklahoma), the EPA projects that any additional NO_X controls resulting from the Transport Rule would be combustion controls only. Furthermore, as explained above, for the ''Nationwide BART'' control scenario we applied the presumptive NO_X limits to all BART-eligible sources nationwide that were not already equipped with post-combustion controls. According to the EPA's BART guidelines, for all types of boilers other than cyclone units the presumptive BART limits for NO_X are based on the use of current combustion control technology.[15] 70 FR 39134. For BART sources already equipped with post-combustion controls, we assumed under BART those controls would operate year-round. Therefore, the ''Nationwide BART'' scenario would result in generally uniform emission rates throughout the year in the five ozone season-only states. As a result, with the exception of Florida, there is no seasonal difference in NO_X emission rates between the ''Transport Rule + BART-elsewhere'' scenario and the ''Nationwide BART'' scenario. In Florida, the one instance where IPM indicates a season-dependent difference between the two control scenarios, there are some EGUs with existing post-combustion controls (SCR) that the EPA projects would not operate at all unless incentivized to do so by either a source-specific BART requirement or by the Transport Rule, and under the Transport Rule would operate only during the ozone season. Our analysis of the two scenarios appropriately considered this seasonal difference by accounting for higher NO_X emissions from those Florida units outside of the ozone season when these controls are projected not to operate in the ''Transport Rule + BART elsewhere'' scenario. That is, our analysis assumed that post-combustion NO_X controls would operate year-round under the ''Nationwide BART'' scenario and only during May through September in the ''Transport Rule + BART elsewhere'' scenario. When we analyzed the overall regional emissions reductions under the two scenarios, this did not affect our conclusion that the two-prong test was satisfied. This outcome is very understandable because over a geographic region this small relative decrease during part of the year in emissions of NO_X in the ''Transport Rule + BART elsewhere'' scenario compared to the ''Nationwide BART'' scenario has much less effect than the visibility improvement attributable to the very large relative decrease in SO_2 emissions between the two scenarios.

Finally, the EPA notes that in a previous rulemaking that established that CAIR was ''better-than-BART'' it was also the case that some states subject to CAIR were subject only to ozone-season NO_X budgets. In that rulemaking, our air quality analysis had similar results and our final rule established that the CAIR could be relied upon as an alternative to source-specific BART for those states.

4. Comments Asserting That the EPA Needs To Re-Do the Analysis

Some commenters asserted that the EPA could not issue a final determination that the Transport Rule achieves greater reasonable progress than BART without conducting a new modeling analysis that would correct an error in the emissions for the ''Nationwide BART'' scenario and that would take into account certain adjustments that the EPA made to some state budgets under the Transport Rule after the air quality modeling runs were completed. Specifically, the commenters noted that the EPA acknowledged in the TSD for the proposal that the emissions analysis for the ''Nationwide BART'' scenario should have, but did not, apply presumptive BART controls on BART-eligible Gerald Gentleman Unit 2 and that the EPA acknowledged that the Transport Rule scenario in the analysis did not take into account budget revisions for a number of states that were published or proposed subsequent to the promulgation of the Transport Rule in August 2011. The commenters believe that because of these two acknowledged discrepancies in the emissions values used in the air quality modeling for the two scenarios, in combination with additional alleged errors, the EPA cannot issue a final determination unless and until a new analysis is conducted that takes these discrepancies into account.

The EPA disagrees that a re-analysis of the two-prong test using new air quality modeling is necessary. As noted in the TSD, the EPA does not believe that the omission of Gerald Gentleman Unit 2 from the BART-eligible inventory of 489 units would affect the outcome of our national analysis.[16] This is because the emission reductions from a single EGU in the BART control scenario would not change the average visibility improvement across all affected Class I areas, which is the basis for our determination. The SO_2 emission reduction in question (roughly 12,000 tons of SO_2 per year) represents a relatively small emission change compared to the emissions from the area encompassed by Nebraska and the surrounding six states. Our response to other alleged errors in the BART inventory is presented in the Response to Comment document.

With respect to revisions in state budgets, as we discussed in the TSD accompanying the December 30, 2011 proposal, the post-analysis increases in the state budgets under the Transport Rule had a relatively small impact on the emissions comparison between the two scenarios. 76 FR 8227. We note that in addition to the Transport Rule revisions we discussed in the proposed rule, there have been proposed subsequent adjustments to state budgets. On February 21, 2012, based on comments received on its previous rulemaking proposal, the EPA published revisions to 2012 and 2014 state budgets in Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, New York, Nebraska, Ohio, Oklahoma, South Carolina and Texas, along with revisions to new unit set-asides in Arkansas, Louisiana and Missouri. 77 FR 10342 and 77 FR 10350.[17] While

[15] There are no coal-fired cyclone units located in any of the five ozone season-only states so the presumptive limits for cyclone units do not apply.

[16] Technical Support Document for Demonstration of the Transport Rule as a BART Alternative, Docket EPA–HQ–OAR–2011–0729. p. 10.

[17] These revisions were originally published in a direct final rule on February 21, 2012. 77 FR 10342. The EPA published a parallel proposal simultaneously with the direct final rule and

Continued

individual state adjustments vary, overall, the total budget increase over the entire Transport Rule region is very small. The EPA believes it is a reasonable expectation that these adjustments would lead to very small impacts on annual and 24-hour $PM_{2.5}$ concentrations and, as a consequence, would not have a meaningful impact on the two-prongedtest satisfied by the analysis conducted for this rule. A technical analysis of these adjustments may be found in the docket (Docket ID No. EPA–HQ–OAR–2011–0729: Sensitivity Analysis Accounting for Increases in Texas and Georgia Transport Rule State Budgets).

After reviewing the public comments on the proposed rule, the EPA is finalizing its finding that the Transport Rule trading programs will provide greater progress towards regional haze goals than source-specificBART. This finding is based on the results of the two-prongedtest for an alternative program. In this case, our analysis demonstrated that the trading programs of the Transport Rule do not cause degradation in any affected Class I area, thus passing the first prong of the test. The second prong of the test assesses whether the ''Transport Rule + BART elsewhere'' scenario results in greater average visibility improvement at affected Class I areas compared to the ''Nationwide BART'' scenario. The average visibility improvement of the ''Transport Rule + BART elsewhere'' alternative was greater than ''Nationwide BART'' on both the 20 percent best and 20 percent worst days, thus passing the second prong of the test. The determination that the Transport Rule trading programs will provide greater progress towards regional haze goals than source-specific BART applies only to EGUs in the Transport Rule trading programs and only for pollutants covered by the programs in each state. Accordingly, we are revising 40 CFR 51.308(e)(4) by essentially replacing the name of the CAIR with the name of the Transport Rule.

We are also finalizing our proposal that a state that chooses to meet the emissions reduction requirements of the Transport Rule by submitting a complete SIP revision that is approved as meeting the requirements of 40 CFR 52.38 and/or 52.39 also need not require BART-eligibleEGUs in the state to install, operate and maintain BART for the pollutants covered by such a trading program in the state.

The results of the ''Transport Rule + BART elsewhere'' control scenario analysis demonstrate that the use of NO_X controls during ozone season only, in the states for which this Transport Rule requirement applies, results in greater visibility improvement than source-specificBART for NO_X. Thus, we are finalizing our proposal that a state in the Transport Rule region whose EGUs are subject to the requirements of the Transport Rule trading program only for ozone season NO_X is allowed to rely on our determination that the Transport Rule makes greater reasonable progress than source-specificBART for NO_X. The states to which this aspect of our final rule applies are Arkansas, Florida, Louisiana, Mississippi and Oklahoma.

IV. Reasonably Attributable Visibility Impairment (RAVI)

A. What did the EPA propose?

We proposed to preserve the language in the regional haze regulations at 40 CFR 51.308(e)(4) that allows states to include in their SIPs geographic enhancements to the trading program to address a situation where BART is required based on RAVI at a Class I area.[18]

B. Public Comments Related to RAVI

We received comments recommending that we explicitly state that the Transport Rule as an alternative to BART does not replace the BART analysis that is required to address RAVI certification. The commenter contends that the BART determination for RAVI needs to address the impairment at the specific Class I area or areas, a requirement that is not addressed by the demonstration of regionally-averagedvisibility improvement. Other commenters agreed that RAVI BART is critical to remedying existing impairment and must be implemented. This commenter also pointed out that RAVI BART is reactive as it requires FLM to voluntarily take action to address an existing problem. As such, RAVI BART will not result in proactive permitting to avoid degradation and it cannot be relied on to prevent hot spots. Furthermore, according to this commenter, the EPA in its finding that CAIR was better-than-BART explained that even under a BART alternative ''* * * CAA section 169A(b)(2)'s trigger for BART based on impairment at any Class I area remains in effect, because a source may become subject to BART based on 'reasonably attributable visibility impairment' at any area'' (citing 40 CFR 51.302).

The EPA proposed to leave unchanged the existing regulatory language regarding geographic enhancements. The purpose of this language is to allow a market-based system to accommodate actions taken under the RAVI provisions. The EPA first adopted such language in the 1999 Regional Haze Rule, 64 FR 35757, and used it again in issuing regulations addressing our determination that CAIR provides for greater reasonable progress than BART, 70 FR 39156, and again in issuing regulations addressing trading program alternatives to BART in general, 71 FR 60612, 60627. In light of the fact that our proposal did not request comment on the interplay of the RAVI requirements in 40 CFR 51.302–306 with the requirements of the Regional Haze Rule, we are not adopting any clarifying interpretation at this time. As a result, this rulemaking alters neither the authority of a federal land manager to certify reasonably attributable visibility impairment nor the obligation of states (or EPA) to respond to a RAVI certification under 40 CFR Part 51 Subpart P (Protection of Visibility). We expect at a later date to clarify the scope of the RAVI requirements through a rule amendment, general guidance, or action on a SIP or FIP in the context of a specific RAVI case.[19] Whatever the form, we intend to provide an opportunity for public comment before applying a new interpretation.

C. Final Action on RAVI

In this final action we are preserving the language in the regional haze regulations at 40 CFR 51.308(e)(4) that allows states to include in their SIPs geographic enhancements to the trading program to accommodate a situation where BART is required based on RAVI at a Class I area. We are not adopting any clarifying interpretation of this language at this time, but we expect at a later date to clarify the scope of the RAVI requirements through a rule amendment, general guidance, or action on a SIP or FIP in the context of a specific RAVI case.

indicated it would withdraw the direct final rule if it received adverse comment. The EPA received adverse comments and on May 16, 2012 published a notice withdrawing the direct final rule before it went into effect. 77 FR 28785. As indicated in the parallel proposal, the EPA intends to take final action on the parallel proposal without providing an additional opportunity for public comment. 77 FR 10350.

[18] A geographic enhancement is a method, procedure, or process to allow a broad regional strategy, such as the Transport Rule cap-and-trade program, to satisfy BART for reasonable attributable impairment. For example, it could consist of a methodology for adjusting allowance allocations at a source which is required to install BART controls.

[19] A RAVI certification has been made for the Sherbourne County Generating Station (Sherco) in Minnesota, by the Department of the Interior on October 21, 2009.

V. Limited Disapproval of Certain States' Regional Haze SIPs

A. What did the EPA propose?

We proposed a limited disapproval of the regional haze SIPs that have been submitted by Alabama, Florida, Georgia, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, and Texas. In separate notices, the EPA also has proposed a limited disapproval of the regional haze SIP submitted by Virginia that relied on CAIR (77 FR 3691), and has finalized a limited disapproval of the regional haze SIPs submitted by Kentucky (77 FR 19098), Tennessee (77 FR 24392), and West Virginia (77 FR 16937). These states, fully consistent with the EPA's regulations at the time, relied on CAIR requirements to satisfy the BART requirement and the requirement for a long-termstrategy sufficient to achieve the state-adoptedreasonable progress goals.

We did not propose to disapprove the reasonable progress targets for 2018 that have been set by the states in their SIPs. The reasonable progress goals in the SIPs were set based on modeled projections of future conditions that were developed using the best available information at the time the analysis was done. Given the requirement in 40 CFR 51.308(d)(1)(vi) that states must take into account the visibility improvement that is expected to result from the implementation of other Clean Air Act requirements, states set their reasonable progress goals based, in part, on the emission reductions expected to be achieved by CAIR. As CAIR has now been remanded by the D.C. Circuit, the assumptions underlying the development of the reasonable progress targets have changed; however, because the overall EGU emission reductions from the Transport Rule are larger than the EGU emission reductions that would have been achieved by CAIR, we expect the Transport Rule to provide similar or greater benefits than CAIR. In addition, unlike the enforceable emissions limitations and other enforceable measures in the long-termstrategy, *see* 64 FR 35733, reasonable progress goals are *not* enforceable measures. Given these considerations, we concluded not to propose disapproval of the reasonable progress goals in any of the regional haze SIPs that relied on CAIR. We noted our intent to act on the remaining elements of the SIP for each state in a separate notice.

B. Public Comments Related to Limited Disapprovals

Several commenters seem to have interpreted our statement that the EPA was not proposing to disapprove the reasonable progress goals set by affected states to mean that the EPA had proposed to determine that these reasonable progress goals meet the requirements of the Regional Haze Rule. The commenters stated that the EPA cannot reasonably conclude that the Transport Rule achieves reasonable progress. As noted in the proposal, we intend to evaluate the reasonable progress goals for each state when taking action on the remaining elements of their regional haze SIPs. As explained above, we do not consider the remand of CAIR to provide a basis for disapproving the reasonable progress goals set by the states. That determination, however, does not indicate that we intend to approve the targets set by the states without any further consideration. In addition, while we have concluded that the Transport Rule achieves greater reasonable progress than BART, we have not determined, as the commenters suggest, that the Transport Rule alone achieves reasonable progress towards the natural visibility goal.

C. Final Action on Limited Disapprovals

This action includes a final limited disapproval of the regional haze SIPs submitted by Alabama, Georgia, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and Texas. We are not finalizing the limited disapproval for Florida at this time because the state has requested additional time to modify its SIP to address the change in applicability of the Transport Rule to Florida in the final rule published on August 8, 2011, (76 FR 48208) and is actively preparing SIP revisions.[20] The EPA included Florida in the proposed Transport Rule for coverage under both the SO_2 and NO_X trading programs, but removed Florida from the SO_2 trading program in the final Transport Rule. Florida was unaware of this modification until publication of the final rule. The EPA has decided to postpone action on Florida's regional haze SIP given this extenuating circumstance, Florida's request for additional time to modify its SIP to address the change in coverage under the Transport Rule, and Florida's continued progress toward submitting a SIP revision.

[20] On May 15, 2012, the EPA proposed limited approval of three revisions to the Florida SIP, including BART determinations for five facilities.

VI. FIPs

A. What did the EPA propose?

We proposed FIPs to replace reliance on CAIR requirements with reliance on the trading programs of the Transport Rule as an alternative to BART for SO_2 and NO_X emissions from EGUs in the following states' regional haze SIPs: Alabama, Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and West Virginia. We proposed FIPs to replace reliance on CAIR requirements with reliance on the Transport Rule as an alternative to BART for NO_X emissions from EGUs in the following states' regional haze SIPs: Florida, Louisiana, and Mississippi.

We proposed that these limited FIPs would satisfy the BART requirement and be a part of satisfying the requirement for a long-termstrategy sufficient to achieve the state-adopted reasonable progress goals. The FIPs would apply only to EGUs in the affected states and only to pollutants covered by the Transport Rule program in those states. The proposed FIPs would not alter states' reasonable progress goals or replace these goals.

B. Public Comments on Proposed FIPs

Similar to the comments received regarding our proposed limited disapprovals, numerous commenters argued that the EPA should not finalize FIPs because, according to the commenters, we cannot rely on the Transport Rule because of the current stay of that rule. Other commenters took the position that we should fully approve the regional haze SIPs that relied on CAIR to satisfy certain regional haze requirements and that our proposed FIPs substituting the Transport Rule as an alternative to source-specificBART in regional haze SIPs are unnecessary.

As explained above in section II.B.2, we do not agree that the EPA cannot rely on the Transport Rule because of the temporary stay imposed by the D.C. Circuit. With respect to reliance on CAIR, as explained in section II.A.3, CAIR has been remanded and only remains in place temporarily; consequently, we cannot fully approve those regional haze SIP revisions that have relied on the now-temporary reductions from CAIR. Although CAIR is currently in place, as a result of the December 30, 2011, Order from the U.S. Court of Appeals for the D.C. Circuit staying the Transport Rule, this does not

affect the earlier court ruling remanding CAIR to the EPA. A number of states objected to the EPA's proposed FIP as these states did not receive a finding of failure to timely submit a regional haze SIP. These states requested the allowable time to revise and resubmit their SIP. Other states which also did not receive a finding of failure to timely submit a regional haze SIP did not object to the EPA's proposed FIP. As explained in section VI.C, we have responded to this comment by granting additional time to those states that prefer to revise and resubmit their SIP to the EPA for approval and did not receive a finding of failure to timely submit their regional haze SIP.

C. Final Action on FIPs

In this action, the EPA is finalizing FIPs to replace reliance on CAIR with reliance on the Transport Rule as an alternative to BART in regional haze SIPs of Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia. Regional haze SIPs were due in December 2007. Under the CAA, the EPA is required to promulgate a FIP within 2 years after finding that a state has failed to make a required submission or after disapproving a SIP in whole or in part, unless the state first adopts and we have fully approved a SIP. CAA section 110(c)(1). We made a finding on January 15, 2009, that Georgia, Indiana, Michigan, Ohio, Pennsylvania, Texas, and Virginia had failed to timely submit a regional haze SIP. We are finalizing the FIPs for Iowa, Missouri, South Carolina, Tennessee, and West Virginia, even though we are not required by the CAA to do so at this time, because of our understanding based on communications with state officials that this action on our part is their preference. Our adoption of these FIPs at this time avoids the near-term need for additional administrative steps on the part of these states. That is, these states do not have to take any further action on their regional haze SIPs until SIP revisions are due in 2018. However, at any time, states may, and are encouraged to submit a revision to their regional haze SIP incorporating the requirements of the Transport Rule. At that time, we will withdraw the FIP being finalized in this action.

We are not finalizing FIPs, as proposed, for Alabama, Florida, Louisiana, Mississippi, or North Carolina. Rather than a FIP, Alabama, Louisiana, Mississippi, and North Carolina have requested additional time to correct the deficiencies in their SIPs and submit a SIP revision. As these states did not receive a finding of failure to submit a regional haze SIP, the EPA is not required to promulgate a FIP at this time. The EPA will be required to issue a FIP for each state that does not submit an approvable SIP revision that corrects the deficiencies related to reliance on CAIR in time for the EPA to review and approve it within 2 years of this final limited disapproval action. We are not finalizing a FIP, as proposed, for Texas in order to allow more time for the EPA to assess the current Texas SIP submittal. Additional time is required due to the variety and number of BART-eligible sources and the complexity of the SIP. The EPA is also deferring action on the proposed FIP for Florida for the reasons discussed in section V.C.

VII. Regulatory Text

A. What did the EPA propose?

Based on our finding that the ''Transport Rule + BART elsewhere'' control scenario passes the two-pronged test, we proposed to determine that the Transport Rule trading program will provide greater progress towards Regional Haze goals than source-specific BART. We noted that the proposed determination would apply only to EGUs in the Transport Rule trading programs and only for the pollutants covered by the programs in each state. Accordingly, we proposed to revise 40 CFR 51.308(e)(4) by essentially replacing the name of CAIR with the name of the Transport Rule.

We also proposed that a state that chooses to meet the emission reduction requirements of the Transport Rule by submitting a complete SIP revision substantively identical to the provisions of the EPA trading program that is approved as meeting the requirements of §52.38 and/or §52.39 also need not require BART-eligibleEGUs in the state to install, operate, and maintain BART for the pollutants covered by such a trading program in the state.

B. Clarification of Final Regulatory Text

A number of the states for which we proposed a FIP had previously failed to either submit a visibility SIP or had failed to submit a SIP that could be fully approved under the visibility regulations issued in 1980. *See* 45 FR 80084 (December 2, 1980). The final regulatory text takes account of this and is not intended to change the findings that have been made in the past with respect to the relevant states' compliance with the requirements of visibility regulations found at 40 CFR 51.302–51.307.

The regulatory text also accounts for final limited approval of the regional haze SIPs of Indiana, Ohio and Virginia that the EPA is finalizing separately, on or about the same day as this action. Including regulatory text that accounts for the final limited approval in this action avoids the need for additional overlapping revisions to the CFR for these states. To ensure that the relevant regulatory text is appropriately revised, we are amending certain regulatory provisions for these states in this action only.[21]

We are also making conforming changes to the regulatory text for the regional haze SIPs of Kentucky, Tennessee and West Virginia as the EPA has previously promulgated a final limited approval and final limited disapproval of these SIPs. For Kentucky, in this action we are making conforming changes to the regulatory text in 40 CFR 52.936(a) regarding the limited approval and limited disapproval of Kentucky's SIP. These conforming changes do not affect the substance of the EPA's final action on Kentucky on March 30, 2012 (77 FR 19098). For Tennessee, in this action we are making conforming changes to the regulatory text in 40 CFR 52.2234(a) regarding the limited approval and limited disapproval of Tennessee's SIP. These conforming changes do not affect the substance of EPA's final action on April 24, 2012 (77 FR 24392). For West Virginia, in this action we are making conforming changes to the regulatory text in 40 CFR 52.2533(d) regarding the limited approval and limited disapproval of West Virginia's SIP. These conforming changes do not affect the substance of the EPA's final action on West Virginia on March 23, 2012 (77 FR 16937).

VIII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because some may view it as raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been

[21] The regulatory text at issue addressing limited approvals and limited disapprovals can be found at 40 CFR 52.791(a), 40 CFR 52.1886(a) and 40 CFR 52.2452(d).

documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This action does not include or require any information collection.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined by the U.S. Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) A governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) A small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. Rather, this rule would allow states to avoid regulating EGUs in new ways based on the current requirements of the Transport Rule and as such does not impose any new requirements on small entities.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, 2 U.S.C. 1531–1538) for state, local, or tribal governments or the private sector. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action merely interprets the statutory requirements that apply to states in preparing their SIPs.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action does not impose any new mandates on state or local governments. Thus, Executive Order 13132 does not apply to this rule. In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicited comments on the proposed rule from state and local officials. We received comments from seven states. These comments are addressed in the final action and in the Response to Comment document.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The rule does not have a substantial direct effect on one or more Indian tribes, since there are no BART-eligible EGU sources on tribal lands in the Transport Rule region. In addition, the CAA does not provide for the inclusion of any tribal areas as mandatory Class I federal areas; thus, tribal areas are not subject to the requirements of the Regional Haze Rule. Furthermore, this rule does not affect the relationship or distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action. The EPA specifically solicited additional comment on the proposed action from tribal officials and we received none.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action does not establish requirements that directly affect the general public and private sectors. Rather, this rule will allow states to avoid regulating EGUs in new ways based on the current requirements of the Transport Rule, and thus may avoid adverse effects that conceivably might result from such additional regulation of EGUs by states.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d), (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (EO) (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority

populations and low-income populations in the United States.

The EPA has concluded that it is not practicable to determine whether there would be disproportionately high and adverse human health or environmental effects on minority and/or low income populations from this final rule. The $PM_{2.5}$ air quality improvements that might be expected under implementation of source-specific BART may differ from the Transport Rule in terms of the emission reductions required at any given source. However, our analysis of the Transport Rule suggests that the regional Transport Rule approach provides widespread health benefits especially among populations most vulnerable to $PM_{2.5}$ impacts. This analysis is presented in detail in the Regulatory Impact Analysis for the Transport Rule which is available in the Transport Rule docket EPA–HQ–OAR–2009–0491 and from the main EPA Web page for the Transport Rule available at *www.epa.gov/airtransport*.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective August 6, 2012.

IX. Statutory Authority

Statutory authority for this rule comes from sections 169A and 169B of the CAA (42 U.S.C. 7491 and 7492). These sections require the EPA to issue regulations that will require states to revise their SIPs to ensure that reasonable progress is made toward the national visibility goals specified in section 169A.

List of Subjects

40 CFR Part 51

Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide.

40 CFR Part 52

Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: May 30, 2012.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 51—[AMENDED]

* 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

* 2. Section 51.308 is amended by revising paragraph (e)(4) to read as follows:

§51.308 Regional haze program requirements.

* * * * *

(e) * * *

(4) A State subject to a trading program established in accordance with §52.38 or §52.39 under a Transport Rule Federal Implementation Plan need not require BART-eligiblefossil fuel-fired steam electric plants in the State to install, operate, and maintain BART for the pollutant covered by such trading program in the State. A State that chooses to meet the emission reduction requirements of the Transport Rule by submitting a SIP revision that establishes a trading program and is approved as meeting the requirements of §52.38 or §52.39 also need not require BART-eligiblefossil fuel-fired steam electric plants in the State to install, operate, and maintain BART for the pollutant covered by such trading program in the State. A State may adopt provisions, consistent with the requirements applicable to the State for a trading program established in accordance with §52.38 or §52.39 under the Transport Rule Federal Implementation Plan or established under a SIP revision that is approved as meeting the requirements of §52.38 or §52.39, for a geographic enhancement to the program to address the requirement under §51.302(c) related to BART for reasonably attributable impairment from the pollutant covered by such trading program in that State.

* * * * *

PART 52—[AMENDED]

* 3. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart B—Alabama

* 4. Section 52.61 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

§52.61 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.306 for protection of visibility in mandatory Class I Federal areas.

* * * * *

(c) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Alabama on July 15, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

Subpart L—Georgia

* 5. Section 52.580 is added to read as follows:

§52.580 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Georgia on February 11, 2010, and supplemented on November 19, 2010, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Georgia on February 11, 2010, and supplemented on November 19, 2010, are satisfied by §52.584.

(c) *Measures Addressing Limited Disapproval Associated with SO_2.* The deficiencies associated with SO_2

identified in EPA's limited disapproval of the regional haze plan submitted by Georgia on February 11, 2010, and supplemented on November 19, 2010, are satisfied by §52.585.

Subpart P—Indiana

* 6. Section 52.791 is added to read as follows:

§52.791 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Indiana on January 14, 2011, and supplemented on March 10, 2011, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Indiana on January 14, 2011, and supplemented on March 10, 2011, are satisfied by §52.789.

(c) *Measures Addressing Limited Disapproval Associated with SO_2.* The deficiencies associated with SO_2 dentified in EPA's limited disapproval of the regional haze plan submitted by Indiana on January 14, 2011 and supplemented on March 10, 2011 are satisfied by §52.790.

Subpart Q—Iowa

* 7. Section 52.842 is added to read as follows:

§52.842 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Iowa on March 25, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Iowa on March 25, 2008, are satisfied by §52.840.

(c) *Measures Addressing Limited Disapproval Associated with SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by Iowa on March 25, 2008, are satisfied by §52.841.

Subpart S—Kentucky

* 8. Section 52.936 is revised to read as follows:

§52.936 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Kentucky on June 25, 2008, and amended on May 28, 2010, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated with NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Kentucky on June 25, 2008, and amended on May 28, 2010, are satisfied by §52.940.

(c) *Measures Addressing Limited Disapproval Associated with SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by Kentucky on June 25, 2008, and amended on May 28, 2010, are satisfied by §52.941.

Subpart T—Louisiana

* 9. Section 52.985 is added to read as follows:

§52.985 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Louisiana on June 13, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(b) [Reserved]

Subpart X—Michigan

* 10. Section 52.1183 is amended by revising paragraph (a) and adding new paragraphs (d), (e), and (f) to read as follows:

§52.1183 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.302, 51.305, and 51.307 for protection of visibility in mandatory Class I Federal areas.

* * * * *

(d) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Michigan on November 5, 2010, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(e) *Measures Addressing Limited Disapproval Associated With NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Michigan on November 5, 2010, are satisfied by §52.1186.

(f) *Measures Addressing Limited Disapproval Associated With SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by Michigan on November 5, 2010, are satisfied by §52.1187.

Subpart Z—Mississippi

* 11. Section 52.1279 is added to read as follows:

§52.1279 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Mississippi on September 22, 2008, and supplemented on May 9, 2011, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(b) [Reserved]

Subpart AA—Missouri

* 12. Section 52.1339 is amended by revising paragraph (a) and adding new paragraphs (c), (d), and (e) to read as follows:

§52.1339 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR

51.306 for protection of visibility in mandatory Class I Federal areas.

* * * * *

(c) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Missouri on August 5, 2009, and supplemented on January 30, 2012, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(d) *Measures Addressing Limited Disapproval Associated With NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Missouri on August 5, 2009, and supplemented on January 30, 2012, are satisfied by §52.1326.

(e) *Measures Addressing Limited Disapproval Associated With SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by Missouri on August 5, 2009, and supplemented on January 30, 2012, are satisfied by §52.1327.

Subpart II—North Carolina

* 13. Section 52.1776 is added to read as follows:

§52.1177 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by North Carolina on December 17, 2007, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(b) [Reserved]

Subpart KK—Ohio

* 14. Section 52.1886 is added to read as follows:

§52.1886 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Ohio on March 11, 2011, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated With NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Ohio on March 11, 2011, are satisfied §52.1882.

(c) *Measures Addressing Limited Disapproval Associated With SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by Ohio on March 11, 2011, are satisfied by §52.1883.

Subpart NN—Pennsylvania

* 15. Section 52.2042 is added to read as follows:

§52.2042 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Pennsylvania on December 20, 2010, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(b) *Measures Addressing Limited Disapproval Associated With NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Pennsylvania on December 20, 2010, are satisfied §52.2040.

(c) *Measures Addressing Limited Disapproval Associated With SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by Pennsylvania on December 20, 2010, are satisfied by §52.2041.

Subpart PP—South Carolina

* 16. Section 52.2132 is amended by revising paragraph (a) and adding new paragraphs (d), (e), and (f) to read as follows:

§52.2132 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.305 and 51.306 for protection of visibility in mandatory Class I Federal areas.

* * * * *

(d) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by South Carolina on December 17, 2007, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

(e) *Measures Addressing Limited Disapproval Associated with NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by South Carolina on December 17, 2007, are satisfied by §52.2140.

(f) *Measures Addressing Limited Disapproval Associated with SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by South Carolina on December 17, 2007, are satisfied by §52.2141.

Subpart RR—Tennessee

* 17. Section 52.2234 is amended by revising paragraph (a) and adding new paragraphs (c) and (d) to read as follows:

§52.2234 Visibility protection.

(a) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Tennessee on April 4, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

* * * * *

(c) *Measures Addressing Limited Disapproval Associated with NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Tennessee on April 4, 2008, are satisfied by §52.2240.

(d) *Measures Addressing Limited Disapproval Associated with SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by Tennessee on April 4, 2008, are satisfied by §52.2241.

Subpart SS—Texas

* 18. Section 52.2304 is amended by revising paragraph (a) and adding new paragraph (c) to read as follows:

§52.2304 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include fully approvable measures for meeting the requirements of 40 CFR 51.305 for protection of visibility in mandatory Class I Federal areas.

* * * * *

(c) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Texas on March 31, 2009, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited disapproval to the plan provisions addressing these requirements.

Subpart VV—Virginia

* 19. Section 52.2452 is amended by revising paragraph (a) and adding new paragraphs (d), (e), and (f) to read as follows:

§52.2452 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.305 and 51.306 for protection of visibility in mandatory Class I Federal areas.

* * * * *

(d) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by Virginia on July 17, 2008, March 6, 2009, January 14, 2010, October 4, 2010, November 19, 2010, and May 6, 2011, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(e) *Measures Addressing Limited Disapproval Associated with NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by Virginia on July 17, 2008, March 6, 2009, January 14, 2010, October 4, 2010, November 19, 2010, and May 6, 2011, are satisfied by §52.2440.

(f) *Measures Addressing Limited Disapproval Associated with SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by Virginia on July 17, 2008, March 6, 2009, January 14, 2010, October 4, 2010, November 19, 2010, and May 6, 2011, are satisfied by §52.2441.

Subpart XX—West Virginia

* 20. Section 52.2533 is amended by revising paragraphs (a) and (d) and adding new paragraphs (e) and (f) to read as follows:

§52.2533 Visibility protection.

(a) *Reasonably Attributable Visibility Impairment.* The requirements of section 169A of the Clean Air Act are not met because the plan does not include approvable measures for meeting the requirements of 40 CFR 51.305, 51.306, and 51.307 for protection of visibility in mandatory Class I Federal areas.

* * * * *

(d) *Regional Haze.* The requirements of section 169A of the Clean Air Act are not met because the regional haze plan submitted by West Virginia on June 18, 2008, does not include fully approvable measures for meeting the requirements of 40 CFR 51.308(d)(3) and 51.308(e) with respect to emissions of NO_X and SO_2 from electric generating units. EPA has given limited approval and limited disapproval to the plan provisions addressing these requirements.

(e) *Measures Addressing Limited Disapproval Associated with NO_X.* The deficiencies associated with NO_X identified in EPA's limited disapproval of the regional haze plan submitted by West Virginia on June 18, 2008, are satisfied by §52.2540.

(f) *Measures Addressing Limited Disapproval Associated with SO_2.* The deficiencies associated with SO_2 identified in EPA's limited disapproval of the regional haze plan submitted by West Virginia on June 18, 2008, are satisfied by §52.2541.

[FR Doc. 2012–13693 Filed 6–6–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0394; FRL–9663–1]

Approval and Promulgation of Air Quality Implementation Plans; Illinois; Consumer Products and AIM Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the addition of a new rule to the Illinois State Implementation Plan (SIP) submitted by the Illinois Environmental Protection Agency (IEPA) on April 7, 2010. The rule being approved into the SIP is Title 35 Illinois Administrative Code (IAC) Part 223, ''Standards and Limitations for Organic Material Emissions for Area Sources.'' The rule is approvable because it is at least as stringent, and in some cases more stringent than, EPA's national consumer products and architectural and industrial maintenance (AIM) coatings rules. However, EPA is conditionally approving four specific paragraphs in the rule, based on a September 2, 2011, letter from IEPA committing to correct the noted deficiencies in these paragraphs within one year of July 9, 2012.

DATES: This final rule is effective on July 9, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2010–0394. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Anthony Maietta, Environmental Protection Specialist, at (312) 353–8777 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Anthony Maietta, Environmental Protection Specialist, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8777, *maietta.anthony@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Smith, Kristi[Smith.Kristi@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Hogan, Stephanie[Hogan.Stephanie@epa.gov]; Payne, James[payne.james@epa.gov]; Smith, Suzanne[Smith.Suzanne@epa.gov]; Anderson, Lea[anderson.lea@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Vijayan, Abi[Vijayan.Abi@epa.gov]
From: Tomasovic, Brian
Sent: Thur 5/25/2017 8:35:45 PM
Subject: RE: Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25
Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25 (002) slh btedits.docx

No issues for me on presentation/verbiage, but I feel there was too big of a swing away from detail in the concept that was in the original paragraphs.

From: Schmidt, Lorie
Sent: Thursday, May 25, 2017 3:27 PM
To: Smith, Kristi <Smith.Kristi@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>
Subject: RE: Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25

Why don't you add some language like that in? I think it would be helpful.

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Smith, Kristi
Sent: Thursday, May 25, 2017 4:27 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew

<Marks.Matthew@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>
Subject: RE: Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25

Also seems consistent to me. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Kristi M. Smith * Assistant General Counsel for the NAAQS Implementation Group * Air & Radiation Law Office * US EPA, Office of General Counsel * smith.kristi@epa.gov * (202) 564-3068 *

From: Zenick, Elliott
Sent: Thursday, May 25, 2017 4:21 PM
To: Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>
Subject: RE: Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25

Looks consistent with our discussion.

From: Hogan, Stephanie
Sent: Thursday, May 25, 2017 4:16 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>
Subject: RE: Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25

I just noticed some stray words at the end that I deleted in this version. Otherwise, I don't have any comments.

Stephanie L. Hogan | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

From: Schmidt, Lorie
Sent: Thursday, May 25, 2017 4:08 PM
To: Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>
Subject: Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25

This is my draft of the revised (largely rewritten) piece based on our discussions.

Ex. 5 - Deliberative Process, Attorney Client, Attorney Work Product

Logistically – how do you want to proceed? Who has the pen next?

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Zenick, Elliott
Sent: Tue 7/11/2017 12:35:12 PM
Subject: FW: TX haze

Just included you on an invite for a short meeting with Justin on these two questions. I do not think that you need to attend.

-----Original Message-----
From: Schwab, Justin
Sent: Tuesday, July 11, 2017 7:19 AM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Baptist, Erik <baptist.erik@epa.gov>
Subject: TX haze

Two questions/items for agenda today. Please let me know if you have any questions or when would be a good time to discuss for a few minutes on phone or in person.

Ex. 5 - Deliberative Process, Attorney Client

Sent from my iPhone

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Payne, James[payne.james@epa.gov]; Smith, Suzanne[Smith.Suzanne@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Smith, Kristi[Smith.Kristi@epa.gov]; Anderson, Lea[anderson.lea@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Vijayan, Abi[Vijayan.Abi@epa.gov]; Tomasovic, Brian[Tomasovic.Brian@epa.gov]
From: Hogan, Stephanie
Sent: Thur 5/25/2017 8:16:14 PM
Subject: RE: Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25
Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25 (002) slh.docx

I just noticed some stray words at the end that I deleted in this version. Otherwise, I don't have any comments.

Stephanie L. Hogan | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

From: Schmidt, Lorie
Sent: Thursday, May 25, 2017 4:08 PM
To: Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>
Subject: Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25

This is my draft of the revised (largely rewritten) piece based on our discussions.

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Logistically – how do you want to proceed? Who has the pen next?

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Smith, Kristi[Smith.Kristi@epa.gov]
From: Hogan, Stephanie
Sent: Thur 5/25/2017 7:40:14 PM
Subject: RE: can someone send me the current draft of the Texas paper?
Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25.docx

Stephanie L. Hogan | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

From: Schmidt, Lorie
Sent: Thursday, May 25, 2017 3:38 PM
To: Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>
Subject: can someone send me the current draft of the Texas paper?

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Zenick, Elliott
Sent: Thur 5/25/2017 7:38:49 PM
Subject: FW: Short update on coordination & Discuss new TX option
Texas Regional Haze SIP Addendum + OGC revised r6cmt 5-25.docx

From: Smith, Suzanne
Sent: Thursday, May 25, 2017 12:35 PM
To: Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>; Schoellkopf, Lynde <Schoellkopf.Lynde@epa.gov>
Cc: Schramm, Daniel <Schramm.Daniel@epa.gov>; Thomas, Carrie <Thomas.Carrie@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>
Subject: RE: Short update on coordination & Discuss new TX option

Please take a look at the revised caveat language. We are trying to provide the caveat, while also convey that we are in support of the concept.

Suzanne J. Smith

Chief, Multimedia Counseling Branch

Office of Regional Counsel

EPA Region 6

214.665.8027

From: Hogan, Stephanie
Sent: Thursday, May 25, 2017 11:13 AM
To: Smith, Kristi <Smith.Kristi@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>;

Schoellkopf, Lynde <Schoellkopf.Lynde@epa.gov>
Cc: Schramm, Daniel <Schramm.Daniel@epa.gov>; Thomas, Carrie <Thomas.Carrie@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>
Subject: RE: Short update on coordination & Discuss new TX option

At Gautam's request, circulating a revised version reflecting a draft legal caveat we just discussed.

Stephanie L. Hogan | US EPA | Office of General Counsel | Air and Radiation Law Office | Mail Code 2344A | phone: (202) 564-3244 | fax: (202) 564-5603

From: Smith, Kristi
Sent: Wednesday, May 24, 2017 3:22 PM
To: Zenick, Elliott <Zenick.Elliott@epa.gov>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Anderson, Lea <anderson.lea@epa.gov>; Marks, Matthew <Marks.Matthew@epa.gov>; Tomasovic, Brian <Tomasovic.Brian@epa.gov>; Vijayan, Abi <Vijayan.Abi@epa.gov>; Hogan, Stephanie <Hogan.Stephanie@epa.gov>; Schoellkopf, Lynde <Schoellkopf.Lynde@epa.gov>
Cc: Schramm, Daniel <Schramm.Daniel@epa.gov>; Thomas, Carrie <Thomas.Carrie@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>
Subject: Short update on coordination & Discuss new TX option

Consistent with our earlier discussion, here are some suggested edits to the Texas addendum document. Ex. 5 - Deliberative Process, Attorney Client

Ex. 5 - Deliberative Process, Attoreny Client

Kristi M. Smith * Assistant General Counsel for the NAAQS Implementation Group * Air & Radiation Law Office * US EPA, Office of General Counsel * smith.kristi@epa.gov * (202) 564-3068 *

To: Zenick, Elliott[Zenick.Elliott@epa.gov]; Smith, Kristi[Smith.Kristi@epa.gov]; Hogan, Stephanie[Hogan.Stephanie@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Anderson, Lea[anderson.lea@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Srinivasan, Gautam
Sent: Thur 5/25/2017 12:26:04 AM
Subject: Fwd: Texas case table
TX OAG Letter.pdf
ATT00001.htm
TX OAG Case List.pdf
ATT00002.htm
2017 TX EGU cases 05 11 3017 pdf.pdf
ATT00003.htm

Forward as needed.

++++++++++
(202) 564-5647 (o)
(202) 695-6287 (c)

Begin forwarded message:

From: "Coleman, Sam" <Coleman.Sam@epa.gov>
To: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>, "Minoli, Kevin" <Minoli.Kevin@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>
Cc: "Payne, James" <payne.james@epa.gov>, "Stenger, Wren" <stenger.wren@epa.gov>, "Gray, David" <gray.david@epa.gov>
Subject: RE: Texas case table

I attached three files. The TX AG sent a letter as part of the Reg Reform Docket that included their version of the ongoing litigation with EPA.. I also attached an EPA version responding to the same question.

We are planning the meeting with the State, that we previously discussed. I wanted everyone to have these background documents.

Next steps

1. TCEQ met with the Gov Ofc yesterday and plans to meet with the EGU owners on 31 May.

2. We will begin to look at dates in June 2017 for a TX-EPA meeting. We can have a "Policy" meeting first, or have a larger meeting that would include DOJ and the TX AG. Please give me some feedback on the Agency preference.

3. EPA should plan on an extended conf call to discuss the scope and content of the meeting in the near future. I propose later next week when we can get some feedback from the State on their meeting with EGU owners

4. Schedule and implement when our plan is agreed to.

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Coleman, Sam
Sent: Thursday, May 11, 2017 12:09 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>
Cc: Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Fwd: Texas case table

Thanks to OGC and my R6 team, Attached is the collaborative effort to capture the essence of the litigation ongoing regarding EGUs and the State of TX. As you can see there is overlap is a number of areas with respect to pollutants and facilities. Additionally, everything is NOT on a coordinated schedule.

Further briefing and discussion is likely appropriate. Let me know if there are questions.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

Begin forwarded message:

From: "Payne, James" <payne.james@epa.gov>
Date: May 11, 2017 at 11:45:58 AM CDT
To: "Schoellkopf, Lynde" <Schoellkopf.Lynde@epa.gov>, "Coleman, Sam" <Coleman.Sam@epa.gov>, "Stenger, Wren" <stenger.wren@epa.gov>, "Donaldson, Guy" <Donaldson.Guy@epa.gov>
Cc: "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: Texas case table

Lynde - thanks to you and team.

Sam and all - this version of the table can be share with Texas or others. The "Potential Pathways" column is removed and the rest of the table has been edited so it can be shared outside the agency.

Jim

Sent from my iPhone

Begin forwarded message:

From: "Schoellkopf, Lynde" <Schoellkopf.Lynde@epa.gov>
To: "Payne, James" <payne.james@epa.gov>, "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: revised litigation table

Jim,

Kristi Smith provided 3 minor comments that I've incorporated into the revised attachment. We should be okay to circulate this as needed. Suzanne mentioned that Kristi plans to set up meetings with OAR in the future to discuss all of this. Thanks!

Lynde J. Schoellkopf

U.S. EPA

Office of Regional Counsel

1445 Ross Ave.

Dallas, TX 75202

Cases related to Texas EGUs

Texas Cases

Action	Status	Comments/Overlap with other cases:	Pollutants
TX Regional Haze BART FIP (*NPCA et al. v. Jackson*, 1: 11-cv-01548 (D.D.C.)) and FIP for Interstate Visibility Transport (*Sierra Club v. McCarthy*, Case No. 4:14-cv-05091-YGR and Case No. 4:14-cv-3198-YGR (consolidated) (N.D. C.A.))	Two CD deadlines to take final action by 9/9/17 to address EGU BART under Regional Haze and interstate visibility transport (i.e., "prong 4") for the 1997 O3 NAAQS and 1997 PM2.5 NAAQS.	Case involves (1) the BART requirements under CAA 169A for EGUs; and (2) whether TX's SIP has the requisite measures to prevent interference with other states visibility protection programs under CAA 110(a)(2)(D)(i)(II).	SO_2, NOx, PM for BART. Impacts on visibility are predominantly from SO2
TX Regional Haze (*Texas v. EPA*, Case No. 16-60118 (5th Cir.)) (Texas filed petitions in the D.C. Circuit that they describe as "protective," litigation and those are in abeyance)	Remanded without vacatur on 3/22/2017.	Entire rulemaking is under judicial stay. Remanded FIP included SO2 control requirements for large EGUs in TX. Remanded SIP disapprovals require new action; Prior partial approvals, though subject to judicial stay, are not part of remand burdens.	SO_2 (for haze)
Interstate Transport SIP	Merits brief due May 31st. Luminant an intervenor.	Texas, TCEQ sued EPA over our final action disapproving the State's December 13, 2012, interstate transport SIP addressing the 2008	2008 Ozone NAAQS (NOx, VOC precursors)

Action	Status	Comments/Overlap with other cases:	Pollutants
(*Texas v. EPA* Case No. 16-60670 (5th Cir.))		ozone NAAQS (81 Fed. Reg. 53,284 (Aug. 12, 2016)). Luminant and related entities intervened on behalf of the petitioners. Our SIP disapproval obligated EPA to promulgate a FIP and we partially addressed this obligation in the 2016 CSAPR Update. Case connected to TX RH discussions and CSAPR Update.	
Interstate Transport FIP (*Sierra Club v. Pruitt*, Case No. 1:00-cv-01541-CKK (D.D.C.))	Pending claim regarding EPA's obligation to promulgate a FIP addressing interstate transport for Texas for the 1997 PM2.5 NAAQS. Status Report due July 24, 2017.	EPA promulgated a FIP addressing the 1997 PM2.5 NAAQS for Texas in the 2011 CSAPR rulemaking. EPA moved to have the claim dismissed based on its promulgation of the FIP in CSAPR, but the D.C. Circuit subsequently remanded the state's annual SO2 budget in 2015. The court therefore denied the motion and ordered EPA to file status reports every 90 days documenting progress on addressing the D.C. Circuit's remand.	1997 PM2.5 NAAQS (NOx and SO2 precursors)

National Rules/Cases

Action	Status	Comments/Overlap with other cases	Pollutants
CSPAR Update (*Wisconsin v. EPA*, Case No. 16-1406	Final Rule issued October 2016. Numerous parties, including Texas & TCEQ, filed	The CSAPR Update quantified and addressed (through an ozone-season NOx allowance trading program) part of states' (including	1997 and 2008 Ozone NAAQS (NOx precursor)

Action	Status	Comments/Overlap with other cases	Pollutants
(and consolidated cases) (D.C. Cir.))	challenges in the D.C. Circuit. Pending briefing schedule from the court.	Texas's) ozone-season NO_X emission reduction obligation pursuant to the good neighbor provision for the 2008 ozone NAAQS, but did not address the full emission reduction obligation. The Rule imposed FIPs to achieve the necessary emissions reductions in time to assist downwind states with meeting NAAQS attainment deadlines. The authority for issuing a FIP for Texas stems from EPA's disapproval of the state's SIP, which is being challenged separately in the 5th Circuit. The Rule also addressed the remand of prior CSAPR budgets promulgated in 2011 addressing the 1997 ozone NAAQS, including the remand of Texas's ozone-season NOx budget.	
CSAPR Better Than BART (*Utility Air Regulatory Group v. EPA,* No. 12-1342 (and consolidated cases) (D.C. Circuit)	Case is fully briefed, but oral argument has not been scheduled.	In this rule, EPA determined that CSAPR would provide for greater reasonable progress than BART. EPA also issued limited disapprovals of a number of SIPs (including that of Texas) based on their reliance on CAIR to meet regional haze requirements and issued FIPs pointing to CSAPR to address issue. Texas, Louisiana, UARG, and Luminant challenged our limited disapprovals of SIPs for reliance on CAIR.	SO_2, NOx
Regional Haze Rule Update D.C. Circuit	Final Rule issued in January 2017. Four states, including Texas, several industry groups, Chamber of Commerce, and	EPA promulgated revisions to the 1999 Regional Haze Rule to clarify the relationship between long-term strategies and reasonable progress goals and states'	PM 10, PM 2.5, NOx, SO2, VOC's (for haze)

Action	Status	Comments/Overlap with other cases	Pollutants
	conservation organizations filed petitions for review. Motions to govern are currently due May 25, 2017.	associated regulatory obligations for determining reasonable progress for the second and subsequent planning periods. The RHR revisions also modified requirements related to, among other things, periodic regional haze progress reports, interstate consultation, and reasonably attributable visibility impairment, and included a one-time extension of the deadline for submission of the next periodic regional haze SIP revision from July 31, 2018, to July 31, 2021.	
SO_2 Designations D.C. Circuit (*Samuel Masias v. EPA*, No. 16-1314 [consolidated with 16-1318, 16-1384, 16-1424, 17-1053, 17-1055) /5th Circuit (*Texas v. EPA*, No. 17-60088)/7th Circuit (Southern Illinois Power Cooperative v. EPA, No. 16-3398)	Texas and Luminant timely filed petitions for review in the D.C. and 5th Circuits of the December 2016 supplemental designations. Texas and Luminant also filed administrative petitions with EPA for those same designations.	On December 13, 2016, EPA designated three areas as nonattainment and one area as unclassifiable in Texas for the 2010 Sulfur Dioxide (SO_2) Primary National Ambient Air Quality Standard, which supplemented the July 12, 2016 designations of 61 other areas in 24 states (collectively "Round 2"). Within the designations challenged by Texas, there is a Luminant EGU located in each of the four areas. In addition to the lawsuits filed in the 5th and D.C. Circuits, Texas and Luminant have also filed administrative petitions with EPA.	SO_2 (2010 primary NAAQS)

Region 6 Louisiana and Arkansas Cases:

Action	Status	Comments/Overlap with other cases	Pollutants
LA Regional Haze BART Action *Sierra Club v. Pruitt*, Case No. 15-cv-O 1555 (D.D.C.).	CD deadline to approve a SIP or issue a FIP Proposal 06/29/17 Final 12/15/17.	We cannot finalize our proposed approval of the portion of the LA RH action addressing EGU BART for NOx until EPA finalizes the national rule proposal that CSAPR continues to be better than BART.	SO2, NOx, PM (for haze)
Arkansas Regional Haze *Arkansas v. EPA* (Case No. 16-4270 (and consolidated cases)) (8 Cir.)	Status Report on negotiations due to Court on 6/9/17. Court put the litigation schedule in abeyance for 90 days to facilitate settlement negotiations. EPA response to stay motions and merit briefs still pending.	On 04-17-17, EPA granted reconsideration of certain requirements in the FIP addressing regional haze/interstate visibility transport requirements. The effectiveness of the FIP requirements that are under reconsideration related to limits for NOx (White Bluff, Flint Creek, and Independence) and SO2 (White Bluff and Independence) were stayed for 90 days. 81 FR 66332 (September 27, 2016). EPA will need to undertake additional rulemaking to extend the compliance dates by an additional 90 days to reflect the 90 day stay of the effectiveness date.	SO_2, NOx, PM (for haze)

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016)	*Texas v. EPA*, 16-1428; consolidated with *Wisconsin v. EPA*, 16-1406 (D.C. Cir.)	On 12/20/16, the State of Texas filed its petition for review. The case is pending a briefing schedule. DOJ has NOT requested abatement of the case.	No.
Air Quality Designations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard, 81 Fed. Reg. 89,870 (Dec. 13, 2016)	*Texas v. EPA*, 17-60088 (5th Cir.) *Masias (Sierra Club) v. EPA*, 16-1314 (*Texas v. EPA*, 17-1053) (D.C. Cir.)	On 2/13/17, Texas filed its petitions for review in the 5th Circuit and the D.C. Circuit. Despite this matter affecting only Texas, on 3/24/17, the DOJ filed a motion to dismiss Texas' filing in the 5th Circuit and seeks to transfer the matter to the D.C. Circuit and combine it with a matter filed by the Sierra Club (16-1314). The motion to dismiss/transfer is being briefed. The DOJ has NOT requested abatement of the case, and the parties await a decision from the court.	No.
Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology Determinations, Limited SIP Disapprovals, and Federal Implementation Plans, 77 Fed. Reg. 33,642 (June 7, 2012)	*Texas v. EPA*, 12-1344, consolidated with *Utility Air Regulatory Group v. EPA*, 12-1342, (D.C. Cir.)	On 8/6/12, the State of Texas filed its petition for review. Final briefs have been filed and the matter is pending oral argument. The DOJ has NOT requested abatement of the case.	No.
[Dis]approval and Promulgation of Air Quality Implementation Plans; Texas; Interstate Transport of Air Pollution for the 2008 Ozone NAAQS, 81 Fed. Reg. 53,284 (Aug. 12, 2016)	*Texas v. EPA*, 16-60670 (5th Cir.)	On 10/11/16, the State of Texas filed its petition for review. On 3/2/17, Texas filed its opening brief. DOJ abatement request pending.	Pending motion.
Protection of Visibility: Amendments to Requirements for State Plans, 82 Fed. Reg. 3078 (Jan. 10, 2017)	*Texas v. EPA*, 17-1021 (D.C. Cir.)	On 1/18/17 (docketed on 1/23/17), the State of Texas filed its petition for review. The case is pending a briefing schedule. DOJ abatement request pending.	Pending motion.

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015)	*Texas v. EPA*, 3:15-cv-00162 (S.D. Tex.); *Texas v. EPA*, 15-60492 (5th Cir.) *In re: EPA Final Rule*, No. 15-3751 (6th Cir.) (consolidated matter includes 15-3853 (Texas) *National Assoc. of Manufacturers v. Dept. of Def., No. 16-299 (U.S.)*	On 6/29/15, Texas filed its complaint challenging the rule in the S.D. Tex. and on 7/16/15 Texas filed a petition for review in the 5th Circuit. The 5th Cir. matter was transferred with others to the 6th Cir. Industrial petitioners brought a jurisdictional question to the Supreme Court, which is pending. The rule has been stayed pending judicial review. A DOJ request to abate the proceeding in the Supreme Court was denied.	No—Court denied, but rule stayed by order of the Court.
Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016)	*Texas v. EPA*, 16-1257, consolidated with *North Dakota, v. EPA*, 16-1242 (D.C. Cir.), and further consolidated with *American Petroleum Institute v. EPA*, 13-1108	On 7/28/16, the State of Texas filed its petition for review. The case is pending a briefing schedule. On 4/4/17, the EPA announced it was reconsidering this rule, 82 Fed. Reg. 16331. On 4/7/17, the DOJ requested abatement of the case, which remains pending.	DOJ requested on 4/7/17.
National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015)	*Texas v. EPA*, 15-1494, consolidated with *Murray Energy Corp. v. EPA*, 15-1385 (D.C. Cir.)	On 12/23/15, the State of Texas filed its petition for review. Briefing is complete and oral arguments were scheduled. The DOJ requested abatement of the case, which the Court granted on 4/11/17.	Yes—granted 4/11/17.
State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy, and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 80 Fed. Reg. 33,839 (June, 12, 2015)	*Texas v. EPA*, 15-1308, consolidated with *Walter Coke, Inc., v. EPA*, 15-1166(D.C. Cir.) *Luminant et al. v. EPA*, 15-60424 (5th Cir.) (transferred to D.C. Cir. on 8/31/15)	On 8/31/15, the State of Texas filed its petition for review in the D.C. Circuit and on 7/10/15 in the Fifth Circuit. On 8/31/15, the 5th Circuit matter was transferred and consolidated with the D.C. Circuit proceeding. Briefing is complete and oral arguments were scheduled. The DOJ requested abatement of the case, which the Court granted on 4/24/17.	Yes—granted 4/24/17.

PENDING EPA RULE CHALLENGES BY THE STATE OF TEXAS

RULE CHALLENGED	CAUSE NOS.	CURRENT STATUS	CASE ABATED?
Supplemental Finding That it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal-and Oil-Fired Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016) (4/16/12)	*Michigan et al. (Texas) v. EPA*, 16-1204 (6/24/16) (D.C. Cir.), consolidated with 16-1127 (D.C. Cir.)	On 6/24/16, Texas joined Michigan and others in filing a petition for review of the supplemental rule. Briefing is complete. The DOJ requested abatement of the case, which the Court granted on 4/27/17.	Yes—granted 4/27/17.
Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015)	*North Dakota et al. (Texas) v. EPA*, 15-1381 (D.C. Cir.) *West Virginia et al. (Texas) v. EPA*, 15-1363 (D.C. Cir.)	On 10/23/15, Texas and others filed a petition for review of each of these rules. Briefing is complete. The DOJ requested abatement of the cases, which the Court granted on 4/28/17.	Yes—granted 4/28/17.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 15, 2017

Honorable Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, MC 1101A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

via regulations.gov

Re: Docket ID No. EPA-HQ-OA-2017-0190, Comments from Texas concerning stay of imminent regulatory deadlines for existing regulations currently subject to litigation and abatement of such litigation pending review of each rule.

Dear Administrator Pruitt;

We write in response to the Environmental Protection Agency's (EPA's) request for comment concerning the agency's internal review and evaluation of existing regulations. *See* 82 Fed. Reg. 17,793 (Apr. 13, 2017). We ask that the EPA Regulatory Reform Task Force consider these comments regarding EPA regulations currently subject to judicial review. The goals stated in Executive Order 13777, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017), if achieved, will help return our country to an era of less burdensome federal regulation and greater cooperation between the federal government and states in environmental regulation.

Cooperative Federalism Principles are Embodied in Environmental Law.

Cooperative federalism is an important principle in our country. This is because "the role of the States as laboratories for devising solutions to difficult legal problems" is long recognized. *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *see United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). To this point, we recognize that deference to the States "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Therefore, when it comes to relations between the States and the federal government, the Supreme Court has admonished the importance of seeking the appropriate "federal balance." *Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 132 S. Ct. 2566, 2659 (2012). The power to spend money, for example, "without concern for the federal balance, has the potential to obliterate

distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *NFIB*, 132 S. Ct. at 2659. The same is true when the federal government exercises its regulatory power. For only if the States are able to experiment, so that we may learn lessons from our collective experiences, will the depth and breadth of the potential of our Union be fulfilled. [1]

Litigation and Regulation Enforcement Should be Suspended Pending Agency Reconsideration.

Unfortunately, as you are aware, the previous administration was unwilling to engage with most states, and took actions or issued rules ignoring the spirit of cooperative federalism embodied in the Clean Air Act and Clean Water Act. *See* 42 U.S.C. § 7401(a)(3), 33 U.S.C. § 1251(b). As a result, Texas and others, along with industry representatives, were routinely forced to seek judicial review of many of the EPA's actions. Enclosed at Attachment 2 is a list of pending actions in which Texas is still involved.

The issue statements and briefs filed in the list of pending actions articulate why each of the challenged rules or actions are arbitrary and capricious, not in accordance with the law, are unnecessary or ineffective, impose costs that exceed benefits, and otherwise create serious inconsistency with the initiatives described in Executive Order 13777. Enclosed at Attachments 3A and 3B are the petitions for review and statement of issues filed by Texas in each of the matters.[2] For the reasons discussed in the filings concerning each of the rules listed in Attachment 1, we request that each of those rulemakings be reconsidered and that any imminent regulatory deadlines be suspended pending your Agency's reconsideration.

Furthermore, although the Department of Justice has sought to abate many matters in litigation while the EPA revaluates each rule,[3] several matters identified in Attachment 1 are not abated, including the Cross State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 Fed. Reg. 74,504 (Oct. 26, 2016); *Texas v. EPA*, 16-1428; consolidated with *Wisconsin v. EPA*, 16-1406 (D.C. Cir.), and Air Quality Designations for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard, 81 Fed. Reg. 89,870 (Dec. 13, 2016); *Texas v. EPA*, 17-60088 (5th Cir.); *Texas v. EPA*, 17-1053, consolidated with *Masias (Sierra Club) v. EPA*, 16-1314 (D.C. Cir.).

---

[1] This is the subject of a more comprehensive letter Texas and 18 other states previously addressed. Letter from Hon. Ken Paxton to Hon. Scott Pruitt, Mar. 7, 2017, at https://www.texasattorneygeneral.gov/files/epress/FINAL_Signed_Letter_to_EPA.pdf (also enclosed at Attachment 1).

[2] Because the Court of Appeals for the Fifth Circuit does not mandate the filing of issue statements, those issue statements are not included. Due to the voluminous nature of filed briefs, we refer the agency to the briefs in such cases rather than include them here.

[3] The abatement of litigation is consistent with Executive Order 13783, Promoting Energy Independence and Economic Growth (Mar. 28, 2017), and Executive Order 13777.

Each of these matters have looming briefing or motion deadlines. Rather than have Texas and other petitioners continue to incur legal expenses and costs to challenge regulations that should be reevaluated, EPA should direct the Department of Justice to abate these matters pending further review of each rule. Any imminent deadlines imposed by those rules should be suspended during agency review.

Abatement of the litigation will allow the EPA time to consider each rule, especially for those rules that form part of a larger, comprehensive framework of unnecessary, overlapping, and duplicative regulation promulgated by the prior administration targeting the same pollutants, goals, and programs of other rulemakings. Particular consideration should be paid to the comprehensive social, economic, and health effects of the entire network of rulemakings and whether rules impose duplicative burdens for negligible net benefits. Abatement will also permit the agency an opportunity to consult with parties in the litigation about revisions to particular rules that might resolve individual grievances.

We appreciate that your agency has many priorities and matters to which to attend and that this request will require substantial deliberation. However, in order to save everyone time and resources, please consider an immediate suspension of any and all active litigation and new regulatory enforcement while the EPA conducts its review and reconsideration of these matters.

We appreciate and thank you for your attention to this matter.

Sincerely yours,

Priscilla M. Hubenak
Chief, Environmental Protection Division
Office of the Attorney General of Texas

Attachments

cc: Ms. Sarah Rees, Director
Office of Regulatory Policy and Management
Office of Policy
Environmental Protection Agency
Mail Code 1803A
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Srinivasan, Gautam
Sent: Fri 6/9/2017 1:33:36 AM
Subject: FW: Draft response to Mandy email

Not sure if a response is past its sell-by date, but do want to close the loop on this one way or the other.

++++++++++++

202-564-5647 (o)

202-695-6287 (c)

From: Srinivasan, Gautam
Sent: Tuesday, June 06, 2017 12:47 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: FW: Draft response to Mandy email

Resending in case have you time to review. Also, reminder that I leave early today (~4:15), so if you can't look at this until you are back in the office and you think this needs to go to Mandy today, you should go ahead and send.

++++++++++++

202-564-5647 (o)

202-695-6287 (c)

From: Srinivasan, Gautam
Sent: Monday, June 05, 2017 9:06 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: Draft response to Mandy email

Ex. 5 - Deliberative Process

Ex. 5 - Attorney Work Product, Attorney Client, Deliberative Process

++++++++++

(202) 564-5647 (o)

(202) 695-6287 (c)

Begin forwarded message:

From: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Date: June 5, 2017 at 10:00:12 AM EDT
To: "Schmidt, Lorie" <Schmidt.Lorie@epa.gov>, "Minoli, Kevin" <Minoli.Kevin@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>, "Coleman, Sam" <Coleman.Sam@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>, "Koerber, Mike" <Koerber.Mike@epa.gov>
Cc: "Stenger, Wren" <stenger.wren@epa.gov>, "Payne, James" <payne.james@epa.gov>, "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: RE: TX Air Issues

Good Morning –

Ex. 5 - Deliberative Process

Thanks,
Mandy

From: Coleman, Sam
Sent: Wednesday, May 31, 2017 9:42 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>
Cc: Stenger, Wren <stenger.wren@epa.gov>; Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>
Subject: TX Air Issues

This is a brief update regarding some of the moving pieces.

TCEQ Commissioner Bryan Shaw has met with Gov Abbott's office to discuss the path forward. We have letters from the TX AG asking that we hold air litigation with TX in abeyance until the parties have a chance to talk and EPA can reconsider some previous decisions. The AG has separately requested a meeting with EPA through DOJ. We anticipate scheduling these meetings after the Jun 6 update from TCEQ.

TCEQ will hold a meeting with its EGU industries/industry associations on today, May 31 to discuss its SIP update around a BART alternative for state-wide SO2 budget/cap with an intrastate trading program and to get industry buy-in. On June 6, TCEQ will provide EPA a debrief of the meeting and, EPA expects, its decision on how it will update its SIP.

Separate from the industry discussion above and internally, TCEQ has been made aware that staying in CSAPR temporarily would provide a process bridge until it completes its SIP update. The bridge of temporary CSAPR coverage could simplify the overall process and provide a more feasible timeline for TCEQ and EPA .

Ex. 5 - Attorney Work Product

Ex. 5 - Deliberative Process, Attorney Work Product, Attorney Client

Reg 6 received a request for a call with Stephanie Kodish with NPCA. Key Region 6 ORC and Air staff, and I spoke with her yesterday. She explained her position on the need for controls on the coal fired EGUs in TX, then asked if we could continue a dialogue and if the Agency planned to act consistently with previous decisions. We told her we would be acting consistently with the CAA and in accordance with court decisions. We also told her that we are guided by the current EO's and policy guidance from HQ. Jim Payne will follow up as appropriate.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Smith, Kristi[Smith.Kristi@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Srinivasan, Gautam
Sent: Tue 5/23/2017 7:10:10 PM
Subject: RE: Meeting on TX Issues

Ok, I'll email her. She's down in RTP today so I assume she's in meetings all day.

++++++++++++

202-564-5647 (o)

202-695-6287 (c)

From: Smith, Kristi
Sent: Tuesday, May 23, 2017 1:00 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Subject: FW: Meeting on TX Issues

Please see Josh Lewis' response below. Can one of you please contact Sarah to see if this HQ coordination meeting will get on the calendar? We'd advise Wednesday or Thursday or next week – we need time to coordinate at a staff level before that meeting but we also need to meet before a meeting DOJ is setting up with the TX AG in the transport case to generally discuss process going forward.

- Kristi

Kristi M. Smith * Assistant General Counsel for the NAAQS Implementation Group * Air & Radiation Law Office * US EPA, Office of General Counsel * smith.kristi@epa.gov * (202) 564-3068 *

From: Lewis, Josh

Sent: Monday, May 22, 2017 4:21 PM
To: Smith, Kristi <Smith.Kristi@epa.gov>
Subject: Re: Meeting on TX Issues

Sarah was touching base with Sam on this. I'm out of the office unexpectedly this week and so probably best to wait to hear from Sarah on next steps.

On May 22, 2017, at 3:24 PM, Smith, Kristi <Smith.Kristi@epa.gov> wrote:

> Josh -
>
> Per the message below, we were discussed Texas issues with Justin Schwab today. He would like to make sure we get a meeting on the calendar early next week to have an HQ discussion about the process and potential options for going forward with the big picture discussion with Texas (and potentially TX EGUs). It would involve haze and transport issues, as well some SO2 round 2 designation issues. Do you have the information you need to put together such a briefing or do you more info from OGC, OAQPS, and CAMD?
>
> - Kristi
>
> Kristi M. Smith * Asst. General Counsel * US EPA, Office of General Counsel
> * smith.kristi@epa.gov * (202) 564-3068*
>
> CONFIDENTIAL communication for internal deliberations only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.
>
> Sent from my iPhone
>
> On May 18, 2017, at 8:48 AM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:
>
> > Let's go ahead and set up an HQ meeting. Sarah, can you/OAR take the lead on setting up logistics?
> >
> > Sam, can you confirm with the state the scope of the meeting –should we plan to discuss all of their issues or only a certain portion of the issues (if so, which ones).

From: Coleman, Sam
Sent: Thursday, May 11, 2017 3:25 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>
Subject: Re: Texas Issues

Thanks

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

On May 11, 2017, at 2:08 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

> That all sounds good. Lorie, please inform DOJ.
>
> I think we can do a meeting in the near future at HQ as well.
>
> Sent from my iPhone

On May 11, 2017, at 3:06 PM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:

Just got off the phone with TCEQ. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

They are working on a path forward for a variety of issues not exclusive to Ozone and would like a meeting with HQ in the near future.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

On May 10, 2017, at 5:10 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:

Sam

Any news from TCEQ? Ex. 5 - Deliberative Process, Attorney Work Product

Ex. 5 - Deliberative Process, Attorney Work Product

Thanks

Lorie

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Coleman, Sam
Sent: Monday, May 08, 2017 5:53 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: RE: Texas Issues

OK

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Schmidt, Lorie
Sent: Monday, May 08, 2017 4:28 PM
To: Coleman, Sam <Coleman.Sam@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Re: Texas Issues

Thanks, Sam.

Once you hear from the commissioners, please let OGC know.

Ex. 5 - Deliberative Process, Attorney Client

Lorie

On May 8, 2017, at 11:43 AM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:

Thanks. There is a filing deadline on 2008 Ozone Transport SIP litigation imposed by DOJ of this Friday (12 May). **Ex. 5 - Deliberative Process**

Ex. 5 - Deliberative Process

Who has the lead on contacting DOJ?

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Gunasekara, Mandy
Sent: Thursday, May 04, 2017 12:31 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Coleman, Sam <Coleman.Sam@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Re: Texas Issues

Yes- let's do it

Sent from my iPhone

On May 4, 2017, at 12:53 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

> For my part this sounds worth considering; I will be interested in hearing other people's views, however.
>
> Sent from my iPhone
>
> On May 4, 2017, at 11:13 AM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:
>
> Last summer EPA, TCEQ and the EGU owners in TX met to attempt global settlement on Haze and on a couple of related issues Ex. 5 - Deliberative Process
>
> **Ex. 5 - Deliberative Process**

Given the current situation, I was wondering if EPA might be interested in having a thoughtful and organized discussion with the state, and the EGUs. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Is EPA interested in convening such a meeting? If so, I would like to schedule a call to discuss format and logistics. Please let me know.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]
From: Smith, Kristi
Sent: Tue 5/23/2017 5:00:16 PM
Subject: FW: Meeting on TX Issues

Please see Josh Lewis' response below. Can one of you please contact Sarah to see if this HQ coordination meeting will get on the calendar? We'd advise Wednesday or Thursday or next week – we need time to coordinate at a staff level before that meeting but we also need to meet before a meeting DOJ is setting up with the TX AG in the transport case to generally discuss process going forward.

- Kristi

Kristi M. Smith * Assistant General Counsel for the NAAQS Implementation Group * Air & Radiation Law Office * US EPA, Office of General Counsel * smith.kristi@epa.gov * (202) 564-3068 *

From: Lewis, Josh
Sent: Monday, May 22, 2017 4:21 PM
To: Smith, Kristi <Smith.Kristi@epa.gov>
Subject: Re: Meeting on TX Issues

Sarah was touching base with Sam on this. I'm out of the office unexpectedly this week and so probably best to wait to hear from Sarah on next steps.

On May 22, 2017, at 3:24 PM, Smith, Kristi <Smith.Kristi@epa.gov> wrote:

> Josh -
>
> Per the message below, we were discussed Texas issues with Justin Schwab today. He would like to make sure we get a meeting on the calendar early next week to have an HQ discussion about the process and potential options for going forward with the big picture discussion with Texas (and potentially TX EGUs). It would involve haze and transport issues, as well some SO2 round 2 designation issues. Do you have the information you need

to put together such a briefing or do you more info from OGC, OAQPS, and CAMD?

- Kristi

Kristi M. Smith * Asst. General Counsel * US EPA, Office of General Counsel
* smith.kristi@epa.gov * (202) 564-3068*

Sent from my iPhone

On May 18, 2017, at 8:48 AM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

> Let's go ahead and set up an HQ meeting. Sarah, can you/OAR take the lead on setting up logistics?
>
> Sam, can you confirm with the state the scope of the meeting –should we plan to discuss all of their issues or only a certain portion of the issues (if so, which ones).
>
> **From:** Coleman, Sam
> **Sent:** Thursday, May 11, 2017 3:25 PM
> **To:** Schwab, Justin <schwab.justin@epa.gov>
> **Cc:** Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>; Smith, Kristi <Smith.Kristi@epa.gov>
> **Subject:** Re: Texas Issues
>
> Thanks
>
> Samuel Coleman, P. E.,
>
> Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

On May 11, 2017, at 2:08 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

That all sounds good. Lorie, please inform DOJ.

I think we can do a meeting in the near future at HQ as well.

Sent from my iPhone

On May 11, 2017, at 3:06 PM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:

Just got off the phone with TCEQ. Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

They are working on a path forward for a variety of issues not exclusive to Ozone and would like a meeting with HQ in the near future.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

On May 10, 2017, at 5:10 PM, Schmidt, Lorie <Schmidt.Lorie@epa.gov> wrote:

Sam

Any news from TCEQ? Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product

Thanks

Lorie

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Coleman, Sam
Sent: Monday, May 08, 2017 5:53 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin

<Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: RE: Texas Issues

OK

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Schmidt, Lorie
Sent: Monday, May 08, 2017 4:28 PM
To: Coleman, Sam <Coleman.Sam@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Re: Texas Issues

Thanks, Sam.

Once you hear from the commissioners, please let OGC know.

Ex. 5 - Deliberative Process, Attorney Client

Lorie

On May 8, 2017, at 11:43 AM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:

Thanks. There is a filing deadline on 2008 Ozone Transport SIP litigation imposed by DOJ of this Friday (12 May). Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Who has the lead on contacting DOJ?

Samuel Coleman, P.E.

Deputy Regional Administrator

EPA Region 6

coleman.sam@epa.gov

214.665.2100 Ofc

214.665.3110 Direct

214.789.2016 Cell

From: Gunasekara, Mandy
Sent: Thursday, May 04, 2017 12:31 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Cc: Coleman, Sam <Coleman.Sam@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Payne, James <payne.james@epa.gov>; Stenger, Wren <stenger.wren@epa.gov>; Gray, David <gray.david@epa.gov>
Subject: Re: Texas Issues

Yes- let's do it

Sent from my iPhone

On May 4, 2017, at 12:53 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

> For my part this sounds worth considering; I will be interested in hearing other people's views, however.
>
> Sent from my iPhone
>
> On May 4, 2017, at 11:13 AM, Coleman, Sam <Coleman.Sam@epa.gov> wrote:
>
> Last summer EPA, TCEQ and the EGU owners in TX met to attempt global settlement on Haze and on a couple of related issues Ex. 5 - Deliberative Process
>
> Ex. 5 - Deliberative Process
>
> Given the current situation, I was wondering if EPA might be interested in having a thoughtful and organized discussion with the state, and the EGUs. Ex. 5 - Deliberative Process
>
> Ex. 5 - Deliberative Process

Is EPA interested in convening such a meeting? If so, I would like to schedule a call to discuss format and logistics. Please let me know.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Srinivasan, Gautam
Sent: Tue 6/6/2017 4:47:18 PM
Subject: FW: Draft response to Mandy email

Resending in case have you time to review. Also, reminder that I leave early today (~4:15), so if you can't look at this until you are back in the office and you think this needs to go to Mandy today, you should go ahead and send.

++++++++++++

202-564-5647 (o)

202-695-6287 (c)

From: Srinivasan, Gautam
Sent: Monday, June 05, 2017 9:06 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: Draft response to Mandy email

Per our catch up, how about this as a response? **Ex. 5 - Deliberative Process**

Ex. 5 - Deliberative Process, Attorney Client

++++++++++++

(202) 564-5647 (o)

(202) 695-6287 (c)

Begin forwarded message:

From: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Date: June 5, 2017 at 10:00:12 AM EDT
To: "Schmidt, Lorie" <Schmidt.Lorie@epa.gov>, "Minoli, Kevin"

<Minoli.Kevin@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>, "Coleman, Sam" <Coleman.Sam@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>, "Koerber, Mike" <Koerber.Mike@epa.gov>
Cc: "Stenger, Wren" <stenger.wren@epa.gov>, "Payne, James" <payne.james@epa.gov>, "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: RE: TX Air Issues

Good Morning –

Ex. 5 - Deliberative Process

Thanks,
Mandy

From: Coleman, Sam
Sent: Wednesday, May 31, 2017 9:42 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>
Cc: Stenger, Wren <stenger.wren@epa.gov>; Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>
Subject: TX Air Issues

This is a brief update regarding some of the moving pieces.

TCEQ Commissioner Bryan Shaw has met with Gov Abbott's office to discuss the path forward. We have letters from the TX AG asking that we hold air litigation with TX in abeyance until the parties have a chance to talk and EPA can reconsider some previous

decisions. The AG has separately requested a meeting with EPA through DOJ. We anticipate scheduling these meetings after the Jun 6 update from TCEQ.

TCEQ will hold a meeting with its EGU industries/industry associations on today, May 31 to discuss its SIP update around a BART alternative for state-wide SO2 budget/cap with an intrastate trading program and to get industry buy-in. On June 6, TCEQ will provide EPA a debrief of the meeting and, EPA expects, its decision on how it will update its SIP.

Separate from the industry discussion above and internally, TCEQ has been made aware that staying in CSAPR temporarily would provide a process bridge until it completes its SIP update. The bridge of temporary CSAPR coverage could simplify the overall process and provide a more feasible timeline for TCEQ and EPA .

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product , Attorney Client

Reg 6 received a request for a call with Stephanie Kodish with NPCA. Key Region 6 ORC and Air staff, and I spoke with her yesterday. She explained her position on the need for controls on the coal fired EGUs in TX, then asked if we could continue a dialogue and if the Agency planned to act consistently with previous decisions. We told her we would be acting consistently with the CAA and in accordance with court decisions. We also told her that we are guided by the current EO's and policy guidance from HQ. Jim Payne will follow up as appropriate.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Srinivasan, Gautam
Sent: Tue 6/6/2017 1:06:02 AM
Subject: Draft response to Mandy email

Ex. 5 - Deliberative Process, Attorney Client

++++++++++++
(202) 564-5647 (o)
(202) 695-6287 (c)

Begin forwarded message:

From: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Date: June 5, 2017 at 10:00:12 AM EDT
To: "Schmidt, Lorie" <Schmidt.Lorie@epa.gov>, "Minoli, Kevin" <Minoli.Kevin@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>, "Coleman, Sam" <Coleman.Sam@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>, "Koerber, Mike" <Koerber.Mike@epa.gov>
Cc: "Stenger, Wren" <stenger.wren@epa.gov>, "Payne, James" <payne.james@epa.gov>, "Smith, Suzanne" <Smith.Suzanne@epa.gov>
Subject: RE: TX Air Issues

Good Morning –

Ex. 5 - Deliberative Process

Thanks,
Mandy

From: Coleman, Sam
Sent: Wednesday, May 31, 2017 9:42 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Minoli, Kevin <Minoli.Kevin@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dunham, Sarah <Dunham.Sarah@epa.gov>; Koerber, Mike <Koerber.Mike@epa.gov>
Cc: Stenger, Wren <stenger.wren@epa.gov>; Payne, James <payne.james@epa.gov>; Smith, Suzanne <Smith.Suzanne@epa.gov>
Subject: TX Air Issues

This is a brief update regarding some of the moving pieces.

TCEQ Commissioner Bryan Shaw has met with Gov Abbott's office to discuss the path forward. We have letters from the TX AG asking that we hold air litigation with TX in abeyance until the parties have a chance to talk and EPA can reconsider some previous decisions. The AG has separately requested a meeting with EPA through DOJ. We anticipate scheduling these meetings after the Jun 6 update from TCEQ.

TCEQ will hold a meeting with its EGU industries/industry associations on today, May 31 to discuss its SIP update around a BART alternative for state-wide SO2 budget/cap with an intrastate trading program and to get industry buy-in. On June 6, TCEQ will provide EPA a debrief of the meeting and, EPA expects, its decision on how it will update its SIP.

Separate from the industry discussion above and internally, TCEQ has been made aware that staying in CSAPR temporarily would provide a process bridge until it completes its SIP update. The bridge of temporary CSAPR coverage could simplify the overall process and provide a more feasible timeline for TCEQ and EPA .

Ex. 5 - Attorney Work Product

Ex. 5 - Attorney Work Product, Attorney Client

Reg 6 received a request for a call with Stephanie Kodish with NPCA. Key Region 6 ORC and Air staff, and I spoke with her yesterday. She explained her position on the need for controls on the coal fired EGUs in TX, then asked if we could continue a dialogue and if the Agency planned to act consistently with previous decisions. We told her we would be acting consistently with the CAA and in accordance with court decisions. We also told her that we are guided by the current EO's and policy guidance from HQ. Jim Payne will follow up as appropriate.

Samuel Coleman, P. E.,

Deputy Regional Administrator

214.665.2100 Ofc

214.665. 3110 Desk

214.665.2016 Cell

Coleman.sam@epa.gov

Sent from my iPhone